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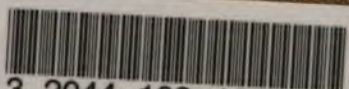
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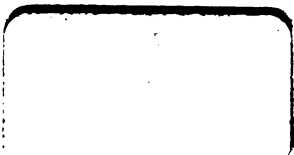
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THE

# LAW OF EXTRADITION,

INTERNATIONAL AND INTER-STATE.

WITH AN

## APPENDIX,

CONTAINING THE EXTRADITION TREATIES AND LAWS OF  
THE UNITED STATES, THE EXTRADITION LAWS OF THE  
STATES, SEVERAL SECTIONS OF THE ENGLISH  
EXTRADITION ACT OF 1870, AND THE  
OPINION OF GOVERNOR CULLOM.

BY

SAMUEL T. SPEAR,

AUTHOR OF "THE LAW OF THE FEDERAL JUDICIARY;" - "THE CONSTITUTIONALITY OF THE LEGAL TENDER ACTS," ETC.

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SECOND EDITION.

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## PREFACE TO THE SECOND EDITION.

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The first edition of this treatise, published in 1879, having been exhausted, the author now presents to the public a second edition of the same, in an enlarged and, as he hopes, a much improved form.

The treatise is divided into two Parts, the first of which considers International Extradition, and the second treats of Inter-State Extradition. The entire work, in both Parts, is and is designed to be distinctively *American*, in the sense of presenting the Law of Extradition as established by the extradition treaties, the Constitution and laws of the United States, and also by the extradition laws of the several States.

So far as the author is aware, no other treatise on this subject, prior to the present one and of American origin, has ever been published in this country. The questions involved are considered, in other law books, only in an incidental manner, as forming but a small part of a much larger whole, without any attempt at an exhaustive investigation.

The field occupied by this work is, therefore, comparatively untrodden in the law literature of this country. The extradition cases of which there is any record, whether international or inter-State, are widely scattered in judicial and other reports; and, after finding these cases and examining their leading features, the author has endeavored to arrange them under appropriate heads, so as to present the law on the subject. Such cases rarely

occur in the ordinary practice of the legal profession ; yet, when they do occur, they may and sometimes do involve important questions of law. If this treatise shall furnish any facility for the solution of such questions, it will have gained, at least, one of its ends.

The Appendix, added to the main body of the work, contains the extradition treaties of the United States now in force, the extradition laws enacted by Congress, the extradition laws of the several States of the Union, several sections of the English Extradition Act of 1870, and the opinion of Governor Cullom in the case of *Gaffigan and Merrick*. This, the author believes, will add to the practical value of the treatise. Special pains have been taken to secure an accurate printing of this part of the work.

Appropriate headings at the top of the pages, together with side headings and a full index of the matter, will enable the reader to refer, with facility, to any part of the volume which he may wish specially to examine.

The occasion which originally led to this work was the diplomatic discussion, in 1876, between the United States and Great Britain, in reference to the case of *Winslow*. The question involved was whether the tenth article of the treaty of 1842 between the two Governments, either expressly or by just and fair implication, provides that a person delivered up under it, as a fugitive criminal, shall not be tried for any offense antedating his extradition, other than that for which he was demanded and surrendered, until he has had a reasonable opportunity of returning to the jurisdiction from which he was thus removed.

This question, in reference not only to the treaty of 1842 with Great Britain, but also to all the extradition treaties of the United States, is considered at large in several of the chapters composing Part I. Some of these chapters are simply reproductions, *totidem verbis*, of the deliverances of American courts on this subject.

The preponderance of judicial authority, as the matter now stands, answers the question in the affirmative, and against the construction of the treaty claimed by the United States in the *Winslow* correspondence, and in favor of that claimed by Great Britain.

The position taken in this treatise is that extradition, whether international or inter-State, except where otherwise expressly provided, secures only a *limited* and *special* jurisdiction of the party extradited, and that the custody thus obtained should be confined to the particular purpose for which it was asked, on the one hand, and granted, on the other. This, for the reasons assigned, is regarded as the only true and consistent doctrine on the subject.

The reader will please to substitute, for the words "The Criminal Code of New York," on page 318, the words "The Code of Criminal Procedure of New York," and thus correct an inadvertence.

The case of *Tully*, found on page 271, taken from a secular newspaper, has since been reported in 20 Fed. Rep. 812. The case of *Windsor*, referred to by Judge Brown, in the *Tully* case, occurred in 1865, and not in 1869, and the deliverance made in this case was by Chief-Justice Cockburn, and not by Lord Chief-Justice Coleridge. The reader will please to note this correction of errors.

This treatise, with these prefatory remarks and explanations, is respectfully submitted to the legal profession, as an aid to practice in that branch of the law to which it relates.

SAMUEL T. SPEAR.

BROOKLYN, N. Y., *November*, 1884.





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# THE LAW OF EXTRADITION.

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## PART I.

### INTERNATIONAL EXTRADITION.

---

#### CHAPTER I.

##### THE LAW OF NATIONS.

1. **The Case of Arguelles.** — The Captain-General of Cuba, in 1864, through the Spanish Minister at Washington, requested Secretary Seward to order the delivery of Don José Augustin Arguelles, an officer of the Spanish army in Cuba, and in the request charged him with a gross offense against the laws of Spain relating to the slave trade. He alleged that Arguelles was a fugitive criminal, and that he had fled to New York with a large sum of money obtained as the fruit of his crime.

Secretary Seward, with the approval of President Lincoln, ordered the arrest and delivery of Arguelles to the Spanish authority, without any treaty with Spain providing therefor, and without any law of Congress authorizing the act. The prisoner, being arrested, was so summarily taken out of the country that there was no opportunity for him to apply to a court of justice to test the lawfulness of this procedure.

The Senate of the United States, on the 28th of May, 1864, adopted the following resolution in respect to this case:

*“Resolved,* That the President be requested to inform the Senate, if he shall not deem it incompatible with the public interest, whether he has, and when, authorized a person, alleged to have committed a crime against Spain or any of its dependencies,

to be delivered up to officers of that Government; and whether such delivery was had; and if so, under what authority of law or treaty it was done." (McPherson's History of the Rebellion, p. 354.)

The President, in his reply, transmitted a report from Secretary Seward, in which the latter said:

"There being no treaty between the United States and Spain, nor any act of Congress directing how fugitives from justice in Spanish dominions shall be delivered, the extradition in the case referred to in the resolution of the Senate is understood by this department to have been made in virtue of the law of nations and the Constitution of the United States. Although there is a conflict of authorities concerning the expediency of exercising comity toward a foreign Government by surrendering at its request one of its own subjects charged with the commission of crime within its territory, and although it may be conceded that there is no national obligation to make such a surrender unless it is acknowledged by treaty or by statute-law, yet a nation is never bound to furnish asylum to dangerous criminals who are offenders against the human race; and it is believed that if in any case the comity could with propriety be practiced, the one which is understood to have called forth the resolution furnished a just occasion for its exercise." (McPherson's History of the Rebellion, p. 355.)

Secretary Seward, while admitting that there was no treaty with Spain and no act of Congress giving to the executive department of the Government the authority exercised in this case, bases the lawfulness of the action on two grounds. One is "the Constitution of the United States;" and in respect to this ground it is sufficient to say that there is not a syllable in the Constitution that, independently of treaty stipulations, has the remotest relation to the extradition of fugitives charged with the commission of crime in other countries. There is no implication in any of the express provisions of this Constitution that the President has or can lawfully exercise any such power.

The other ground referred to by Secretary Seward is "the law of nations." This raises the question whether the action was authorized by "the law of nations," as acknowledged and accepted by the United States. If not so authorized, then the action was absolutely without any legal authority, and if so, was an assump-

tion of power not granted to the President of the United States. What then is the fact? Does "the law of nations," as recognized and adopted in this country, give to the President this power?

2. **The Law of Nations.**—Mr. Wheaton in his *Elements of International Law* (Lawrence's ed. 1863), page 232, mentions Grotius, Heineccius, Burlamaqui, Vattel, Rutherford, Schmelzing and Kent, as holding "that according to the law and usage of nations, every sovereign State is obliged to refuse an asylum to individuals accused of crimes affecting the general peace and security of society, and whose extradition is demanded by the Government of that country within whose jurisdiction the crime has been committed." He also names Puffendorf, Voet, Martens, Kluber, Leyser, Kluit, Saalfeld, Schmaltz, Mittermeyer and Heffter as maintaining that "the extradition of fugitives from justice is a matter of imperfect obligation only, and though it may be habitually practiced by certain States as the result of mutual comity and convenience, requires to be confirmed and regulated by special compact, in order to give it the force of an international law."

It is, perhaps, enough to say in regard to these authorities, all of whom are foreigners with the exception of Kent, that their conflict of opinion shows that the principle of extradition, viewed irrespectively of treaty stipulations, has never been so established in the practice of European nations as to entitle it to be regarded as an international law. These nations in modern times dispose of the question by treaties; and this shows that, whatever may have been their earlier practice, they do not now recognize any obligation to surrender fugitive criminals to one another, except as the same is provided for in this way.

We hence conclude, without going into a lengthy discussion of this point, that there is not now in Europe, if there ever were, any international law of extradition beyond that which treaties create and prescribe. If there were it would not be operative in, and binding upon, the United States, except as the Government thereof may have seen fit to adopt it.



**3. Practice of the Government.** — As a matter of fact, it is not and never has been the practice of the United States Government either to demand or surrender fugitive criminals, except where the right has been secured and the obligation imposed by treaty. The general usage of the country gives no support to the theory of extradition on the ground of either comity or international law. It rather contradicts and excludes such a theory.

In 1873 the Belgian Minister requested the United States to deliver up Carl Vogt, in the absence of any treaty of extradition with Belgium. To this request Mr. Bancroft Davis, the then acting Secretary of State, replied as follows: "The authority of the Executive to abridge personal liberty within the jurisdiction of the United States, and to surrender a fugitive from justice in order that he may be taken from their jurisdiction, is derived from the statutes of Congress, which confer that power only in cases where the United States are bound by treaty to surrender such fugitives, and have a reciprocal right to claim similar surrender from another power. I am, therefore, constrained to decline to comply with your request for the surrender of Carl Vogt." (Foreign Relations of the United States, 1873, vol. 1, p. 81.)

The extradition provision in the treaty of 1794 with Great Britain was limited to the period of twelve years; and hence, after 1806, it ceased to be operative, and no similar stipulation was entered into until the ratification of the Ashburton treaty of 1842. An application was, however, made in 1840 to the President, requesting the delivery of George Holmes, a naturalized citizen of the United States, charged with having committed murder in Lower Canada. The President declined to comply with the request, assigning as the reason that, in the absence of a treaty, he had no power to order the delivery.

Holmes being then in Vermont, an application was made to the Governor of that State, who issued his warrant of arrest; and Holmes, being in the custody of the sheriff, applied to the Supreme Court of Vermont for a writ of *habeas corpus*, to test the legality of his imprisonment. The court granted the writ, and, after hearing the case, held that he was lawfully restrained of his liberty. A writ of error was then taken to the Supreme Court of the United States; and, the court being equally divided on

the question of jurisdiction over the case, the writ was dismissed. (*Holmes v. Jennison*, 14 Pet. 548.)

In 1793 Mr. Genet, the Minister of the French Republic, made a request for the delivery of several persons who were citizens of France, to which Mr. Jefferson, in his letter of September 12, 1793, thus replied: "The laws of this country take no notice of crimes committed out of their jurisdiction. The most atrocious offender, coming within their pale, is received by them as an innocent man, and they have authorized no one to seize or deliver him. The evil of protecting malefactors of every dye is sensibly felt here, as in other countries; but, until a reformation of the criminal codes of most nations, to deliver fugitives from them would be to become their accomplices. The former is viewed, therefore, as the lesser evil. When the consular convention with France was under consideration, this subject was attended to; but we would agree to go no further than is done in the ninth article of that instrument, where we agree mutually to deliver up captains, marines, sailors and all other persons being part of the crew of the vessels, etc. Unless, therefore, the persons before named be a part of the crew of some French vessel, no power in this country is authorized to deliver them up; but, on the contrary, they are under the protection of the laws." (*American State Papers*, vol. 1, p. 175.)

In 1791 Governor Pinckney, of South Carolina, requested President Washington to demand of the Governor of Florida the surrender of certain persons who, having committed offenses in South Carolina, had taken refuge in Florida. The question was referred to Mr. Jefferson, who was then Secretary of State; and in his letter to the President, of November 7th, 1791, he said: "England has no convention with any nation for the surrender of fugitives from justice, and their laws have given no power to the executive to surrender fugitives of any description. They are, accordingly, constantly refused, and hence England has been the asylum of the Paulis, the La Mottes, the Calonnias, in short, of the most atrocious offenders as well as of the most innocent victims who have been able to get there. The laws of the United States, like those of England, receive every fugitive, and no authority has been given to our executives to deliver them up.

If, then, the United States could not deliver up to General Quesnada fugitives from the laws of his country, we cannot claim as a right the delivery of fugitives from us. And it is worthy of consideration whether the demand proposed to be made in Governor Pinckney's letter, should it be complied with by the other party, might not commit us disagreeably, and perhaps dishonorably." (Clarke on Extradition [sec. ed.], p. 34.)

A still earlier case, occurring in 1784, before the adoption of the Constitution, was that of Chevalier de Longchamps, who was indicted in Philadelphia for "threatening bodily harm to M. Marbois, the Consul-General of France in the United States, and Secretary to the French Legation, and also for an assault upon him." Having appeared in the uniform of a French officer and called himself such, the Minister of France demanded that he should be delivered up that he might be sent to France for trial and punishment. The court before which the indictment was brought, being informed of this demand, had two questions to decide. One was whether the prisoner could be lawfully delivered up, which was answered in the negative. The other was whether, if he could not be delivered up, he could be imprisoned until the King of France should declare the reparation satisfactory; and this also was answered in the negative. Being convicted on both counts of the indictment, he was punished by fine and imprisonment under American laws, but not surrendered to the French Government. (*Respublica v. Longchamps*, 1 Dall. 120.)

These cases show that the international surrender of fugitive criminals, except as provided for by treaty, has no basis or sanction in the usage of the United States. The only instance of such surrender without a treaty requiring it, during the entire history of the Government, is that of Arguelles.

Chief Justice Taney, in *Holmes v. Jennison*, 14 Pet. 540, 574, referred to the treaty of 1794 with Great Britain, the twenty-seventh article of which provided for extradition between the two countries, and ceased to be operative after 1806, and then proceeded to say:

"It is believed that the General Government has entered into no treaty stipulations upon this subject since the one above men-

tioned, and in every instance where there was no engagement by treaty to deliver, and a demand has been made, they have uniformly refused, and have denied the right of the Executive to surrender, because there was no treaty and no law of Congress to authorize it. And acting upon this principle throughout, they have never demanded from a foreign Government any one who fled from this country in order to escape from the punishment due to his crimes."

This was said in 1840, when the United States had no treaty of extradition with any other Government, and had had none since 1806. The settled practice of the Government, under these circumstances, was neither to demand nor surrender fugitive criminals.

**4. Laws of Congress.**—Congress, in 1848, passed its first law on this subject, which, being supplemented by other acts, constitutes the law of the United States in respect to international extradition. The only cases to which this law, by its express terms, is applicable, are those for which provision is made by treaty. The obvious implication is that there are no other lawful cases of such extradition.

The power to pass such a law rests upon that provision of the Constitution which authorizes Congress "to make all laws which shall be necessary and proper for carrying into execution" all powers vested "in the Government of the United States, or in any department or officer thereof." The treaty power given to the President, subject in its exercise to the advice and consent of the Senate, is one of these powers; and there can be no doubt that it extends to treaties of extradition with foreign nations.

This, as Attorney-General Cushing declared in the *Case of a deserter from the Danish ship Sago*, 6 Op. Att.-Gen. 155, is the source from which Congress derives its authority to enact a law for the delivery of criminal fugitives from other countries. The framers of the Constitution seem to have regarded the whole question as being covered by the treaty power, and hence made no other provision in regard to it. And if Congress be thus limited in its power, what reasonable pretense can there be for the theory that the President, with no treaty and no law giving him the authority, has the power to order the arrest and delivery of a fugitive criminal from another country?

5. **Opinions of Attorney-Generals.**—The Attorney-Generals of the United States have been frequently called upon to express their official opinions on various points connected with international extradition. One of the earliest of these opinions was given by Attorney-General Lee in 1797, in the *Case of William Jones*, 1 Op. Att.-Gen. 68, in which he said: "If a demand were formally made that William Jones, a subject and fugitive from justice, or any of our own citizens, heinous offenders within the dominion of Spain, should be delivered to their Government for trial and punishment, the United States are in duty bound to comply; yet having omitted to make a law directing the mode of proceeding, I know not how, according to the present system, a delivery of such offender could be effected. To refuse or neglect to comply with such a demand may, under certain circumstances, afford to the foreign nation just cause for war."

The United States at the time had no extradition treaty with Spain, and hence the whole question was simply one of comity, which Attorney-General Lee regarded as equivalent to an international obligation. He saw no way of discharging the duty in the then existing state of the law, and hence suggested the expediency of enacting a law to remedy the difficulty.

Attorney-General Wirt, in *Sullivan's Case*, 1 Op. Att.-Gen. 509, in 1821 went into a thorough examination of the question; and the result to which he came was stated as follows: "The truth seems to be that this duty of delivering up criminals is so vague, is of so imperfect a nature as an obligation, is so inconveniently incumbered in practice by the requisition that the party demanded shall have been convicted on full and judicial proof, or such proof as may be called for by the nation on whom the demand is made, and the usage to deliver or refuse being perfectly at the option of each nation, has been so various, and consequently so uncertain in its action, that these causes combined have led to the practice of providing by treaty for *all cases* in which a nation wishes to give herself a right to call for fugitives from her justice."

The demand in this case was made by Great Britain without any extradition treaty, and the Attorney-General held that there was no obligation to comply with it. He added the expression

of an opinion that even if there were such an obligation under the law of nations, "still the President has no power to make the delivery," since he can derive this power only from treaties or from acts of Congress, neither of which then contained any provision giving him such authority.

In the *Case of two Portuguese Seamen*, 2 Op. Att.-Gen. 559, whose delivery was requested by the King of Portugal, Attorney-General Taney said: "There is no law of Congress which authorizes the President to deliver up any one found in the United States who is charged with having committed a crime against a foreign nation, and we have no treaty stipulations with Portugal for the delivery of offenders. In such a state of things it has always been held that the President possesses no authority to deliver up the offender." So also, in reference to the *Application of Chevalier Huygens*, 2 Op. Att.-Gen. 452, he said: "As there is no stipulation by treaty between the two governments for the mutual surrender of fugitives from justice, I think the President would not be justified in directing the surrender of the person on whom a part of the stolen articles may have been found, in order that he may be brought to trial in the country where he is supposed to have committed the robbery."

In *De Witt's Case*, 3 Op. Att.-Gen. 661, Attorney-General Legaré said: "The President is not considered as authorized, in the absence of any express provision by treaty, to order the delivering up of fugitives from justice."

In *Wing's Case*, 6 Op. Att.-Gen. 85, Attorney-General Cushing, after referring to the cases for extradition specified in the treaty of 1842 with Great Britain, and remarking that larceny, the offense charged against Wing, was not embraced in the list, proceeded to say: "It is, therefore, in these cases only that, by treaty, either Government can claim the extradition of fugitives taking refuge in the dominions of the other. It is the settled politic doctrine of the United States that, independently of special compact, no State is bound to deliver up fugitives from the justice of another State. \* \* \* I am, therefore, of opinion that to grant the present application would be contrary to true doctrines of international law."

So also in *Hamilton's Case*, 6 Op. Att.-Gen. 431, Attorney-General Cushing said: "It is the established rule of the United States neither to grant nor to ask for extradition of criminals, as between us and any foreign Government, unless in cases for which stipulation is made by express convention."

These opinions are very far from sustaining the position assumed by Secretary Seward in ordering the surrender of Arguelles to the Spanish authorities. Only one of them, that of Attorney-General Lee, given in 1797, claims that extradition, in the absence of treaties, has any basis in the law of nations; and even he did not hold that the duty could be discharged by the executive department of the Government, unless it was expressly empowered for this purpose by the legislative action of Congress.

**6. Judicial Opinions.** — The question of international extradition has frequently come before the courts of this country; and, with a single exception, the opinions expressed are unanimous to the effect that there is no obligation to surrender fugitive criminals, except as provided for by treaty stipulations. Chancellor Kent, *In the Matter of Daniel Washburn*, 4 Johns. Ch. 105, who was charged with theft in Canada, and brought before him on *habeas corpus* in 1819, expressed the following opinion: "It is the law and usage of nations, resting on the plainest principles of justice and public utility, to deliver up offenders charged with felony and other high crimes, and fleeing from the country in which the crime was committed, into a foreign and friendly jurisdiction. When a case of that kind occurs it becomes the duty of the civil magistrate, on due proof of the fact, to commit the fugitive, to the end that a reasonable time may be afforded for the Government here to deliver him up, or for the foreign Government to make the requisite application to the proper authorities for his surrender. \* \* \* Whether such offender be a subject of the foreign Government, or a citizen of this country. would make no difference in the application of the principle."

A similar opinion is expressed in his Commentaries (third ed.), vol. 1, p. 36. Chancellor Kent is very high authority; yet the doctrine here stated is not supported, but rather expressly contradicted by the judiciary of this country.

In *The Commonwealth v. Deacon*, 10 Serg. & Rawle, 125, Chief Justice Tighlman, of the Supreme Court of Pennsylvania, had occasion in 1823 to consider this subject; and after an elaborate review of the opinions of "respectable authors, the practice of nations and judicial decisions," he came to the following conclusion: "Upon the whole, the safest principle seems to be that no State has an absolute and perfect right to demand of another the delivery of a fugitive criminal, though it has what is called an *imperfect* right—that is, a right to ask it as a matter of courtesy, good will and mutual convenience. But a refusal to grant such request is no just cause of war." The mere right to ask the delivery, which is the only right conceded by the Chief Justice, is really no right at all, since it imposes no obligation.

In *The United States v. Davis*, 2 Sumn. 482, Mr. Justice Story, in stating the opinion of the court, said in 1837: "We are of opinion that, under the circumstances established in evidence, there is no jurisdiction in this case." In answer to the suggestion of the district judge that Davis should be remanded to the foreign Government for trial, Mr. Justice Story remarked: "That he had never known any such authority exercised by our courts, except where the case was provided for by the stipulations of some treaty. He had great doubts whether, upon principles of international law, and independent of any statutable provisions of treaty stipulations, any court of justice was either bound in duty, or authorized in its discretion, to send back any offender to a foreign Government whose laws he was supposed to have violated." The district judge assented to this view, and the prisoner was discharged.

In the *Case of Jose Ferreira Dos Santos*, 2 Brock. 493, Judge Barbour, who was subsequently appointed as one of the justices of the Supreme Court of the United States, remarked that the solution of the question presented to the court depended upon that of two others: "1. Has a nation, whose citizen or subject commits a crime within its own jurisdiction, and is afterward found within that of another, a right by the law of nations, upon its demand, to have him delivered up by that other, for the purpose of being tried where the crime was committed? 2. If such right exists, have the judicial officers of the United States, sup-



posing the evidence to be sufficient, any authority to act in relation to it as auxiliary to the executive department?" Both of these questions were considered at large, and both answered in the negative.

Judge Barbour, in the conclusion of his deliverance, said: "I am of opinion that, without a treaty stipulation, this Government is not under any obligation to surrender a fugitive from justice to another Government for trial, and that, as a judicial officer of the United States, I have no authority whatever, either to arrest or detain, with a view to such surrender." The United States had no extradition treaty with Portugal; and hence the prisoner, who was a Portuguese subject, was at once discharged. This case occurred in 1835.

In *The Matter of the British Prisoners*, 1 Woodb. & Minot, 66, which, in 1845, came before the United States Circuit Court for the First Circuit, Judge Woodbury, after stating the facts of the case, proceeded to say: "It was then a proper case, and one expressly enumerated under the stipulations of the treaty of 1842 for the surrender of a supposed offender. But without such a stipulation, however fit it might seem in comity or morals to surrender citizens of other countries to answer for offenses committed at home against their own laws, it is usually considered that there is no political obligation under the laws of nations to do it."

In *Adriance v. Lagrave*, 59 N. Y. 110, Chief Judge Church, in stating the opinion of the Court of Appeals, said: "It was formerly very much questioned among jurists whether the surrender of fugitives from justice, by one Government to another, was a duty or obligation imposed by the law of nations, or depended upon courtesy or comity, which might, or not, be exercised at the pleasure of each Government without cause of complaint. In this country, and in England at least, it has been substantially settled that no such duty exists; and in practice it is believed that in nearly all countries neither demand nor surrender is now made, except in obedience to treaty stipulations."

The Court of Appeals of Kentucky, in *The Commonwealth v. Hawes*, 13 Bush, 697, said: "The right of one Government to demand and receive from another the custody of an offender who

has sought asylum upon its soil, depends upon the existence of treaty stipulations between them, and in all cases is derived from, and is measured and restricted by, the provisions, express or implied, of the treaty."

So, also, in *The Matter of Metzger*, 5 How. 176, the Supreme Court of the United States said: "The surrender of fugitives from justice is a matter of conventional arrangement between States, as no such obligation is imposed by the law of nations."

**7. The Conclusion.**—The preponderance of authority derived from practice, the legislation of Congress, the opinions of the Attorney-Generals of the United States, and the deliverances of the judiciary, both State and Federal, clearly shows that no department of the General Government is either bound or authorized to deliver up fugitive criminals from other countries, except in those cases for which provision is made by treaty. The powers of the Government are bestowed by the Constitution; and, except as it may be clothed with the extradition power through treaties, no such power is found among the express or implied grants to Congress, or among those to the executive department, or among the powers given to the Federal judiciary. There can be no discretion in the exercise of the power, since it does not exist at all.

The delivery of Arguelles, being wholly without any legal authority, was not at all excusable by the fact that the alleged fugitive was supposed to be guilty of a heinous offense. This supposition, if true, does not change the principle or the nature of the act. Rules of law do not vary with the merits or demerits of the particular case to which they are applied. Lynching men for murder, not being the method prescribed by law for killing murderers, is itself an act of murder.

So the forcible seizure of a person and the delivery of him to the agent or agents of another Government, to be removed from the jurisdiction and protection of the laws of this country, and to be tried for a crime or crimes committed elsewhere, unless authorized and provided for by a treaty, can have no other legal character than that of official kidnapping. The action of the executive branch of the Government, in the case of Arguelles,

was an enormous usurpation of power, and, as a precedent, is one of the very worst in our whole history. It ought to have called forth the most unqualified protest on the part of Congress.

The theory that any person, peacefully coming within the jurisdiction of our laws, and committing no offense against them, may, in the absence of any treaty or law of Congress authorizing his extradition on the charge of crime made by a foreign Government, be denied the right of unmolested asylum at the discretion of the President of the United States, assigns to his office the prerogatives of an absolute despot. Such was the theory put in practice with reference to Arguelles.

We have selected this case, not on account of the man himself, but on account of the principle involved in it, and especially for the purpose of considering the question whether the General Government, independently of treaties, is clothed with the power of international extradition, and also whether such extradition on the simple basis of the law of nations has any legal standing among the American people. The preponderance of authority is overwhelmingly against the idea.

Secretary Seward, in his answer to the resolution of the Senate, remarked that no nation is "bound to furnish asylum to dangerous criminals who are offenders against the human race." This is true, yet it has no relation to the question whether the arrest and delivery of Arguelles were legally justifiable. The President of the United States is not clothed with the total sovereignty of the United States, but is simply the executive authority thereof, and, as such, limited in his powers and duties by the Constitution and laws of the United States, and cannot lawfully exercise any power with which he is not thus invested. The policy of the United States as to the extradition of fugitive criminals is not to be settled by an executive act, without the warrant of a treaty, or any law of Congress authorizing the act.

## CHAPTER II.

## STATE AUTHORITY.

The question which it will be the object of this chapter to consider and answer, is whether the States of the Union have the power, since the adoption of the Constitution of the United States, to deliver up to a foreign Government persons found within their respective territories, at the request or demand of such Government, and upon the charge and proof that these persons have committed crimes against its laws, in order that they may be tried and punished for such alleged offenses.

This question relates entirely to that form of extradition which is called international, and has nothing to do with inter-State extradition, for which a special provision is made in the Constitution of the United States. If, as was partly shown in the previous chapter, and will be more fully shown in the next chapter, the United States possess the extradition power, to be exercised by the President in making and executing extradition treaties, then it is important to ascertain whether the same power is also possessed by the several States composing the Union, and may by them be concurrently exercised. This is the present inquiry.

**1. The Political Status of the States.**—The States of the Union, in themselves considered as distinct and separate political organizations, are not nations, any more than the towns and counties composing them are nations. They are simply parts of the political body or nation known as “the United States of America.” They have no treaty power. They neither send nor receive ambassadors. They conduct no foreign correspondence with the nations of the earth. They can neither declare war nor make peace. They have no political status, as nations, in the great family of nations.

The United States, on the other hand, form a nation, and, through the Government thereof, manage and conduct all the relations of the country with other nations. The Government of the United States does, in this respect, precisely the things

which the States have no power to do. All international matters, alike by the letter and spirit of the Constitution, are obviously intended to be placed exclusively in its hands, and withdrawn from the sphere of State powers and State action.

The extradition of fugitive criminals, at the request of a foreign Government, is plainly an international matter, properly belonging to the foreign intercourse of the United States. It is a question between the Government of the United States and foreign Governments. The latter, either with or without a treaty, make the request or demand, when fugitive criminals have sought asylum in this land; and the former deals with the matter according to its sense of propriety and justice.

If then the General Government, through the treaty power, possesses the extradition power, as will be shown in the ensuing chapter, and if this power belongs to the foreign intercourse of the country in which the States as such do not participate, the strong presumption from the whole analogy and structure of the Constitution is that the States do not also possess the same power. The possession of this power by the States, if real, would be exceptional to the general import and design of the Constitution. It would in this respect place them in relations to other countries not elsewhere recognized or admitted in that instrument.

There is, moreover, no practical necessity that the States should possess or exercise this power. The possession of it by the General Government, and its operation through that Government in all parts of the United States, are amply sufficient for all the purposes sought to be gained by extradition.

**2. The Question of Repugnancy.**—It is one of the settled rules, in the interpretation of the Constitution, that the States possess no power which, in the exercise thereof, would be repugnant to a similar power granted to the General Government, and that, too, whether the power be expressly prohibited to the States or not. Alexander Hamilton laid down this principle, and the Supreme Court of the United States has repeatedly affirmed it. (*The Federalist*, No. 52.)

Now, it being assumed that the General Government does pos-

sess the extradition power, and may exercise it in its discretion, then, if the States also possess the same power and may exercise it in their discretion, the latter may entirely frustrate the policy adopted by the former. The refusal of the General Government to make extradition treaties, or to deliver up fugitive criminals to foreign Governments under any circumstances, or to make the delivery of such a criminal in a specific case, could be rendered utterly null and void, if what the Government refuses to do each of the States might do.

So, also, if the Government should by treaty enter into stipulations with other Governments on this subject, and thus define the circumstances and rules under which, the crimes for which, and the evidence upon which, extradition might be had, all this would be nugatory, if it were true that every State in the Union, as such, possessed, independently and concurrently with the General Government, the power of regulating this subject within its own territory. It might have a policy entirely different from that of the General Government.

The President, upon this supposition, could make no treaty on the subject, and Congress could enact no law for its execution, that would establish any uniform and settled rule in the practice of the country. Whatever might be the policy of the General Government, whether negative in the form of refusal, or positive in the form of extradition treaties, it would be at the option of the States either to change or reverse it at any time, by the adoption of a different policy.

The possession of the extradition power, by the States, is manifestly repugnant to the possession and exercise of the same power by the General Government. And, inasmuch as the latter undoubtedly possesses the power, it follows as a necessary inference that the former do not and cannot possess and exercise it.

The case is not parallel to those cases in which concurrent but compatible powers, as, for example, the power of taxation, are possessed alike by the General Government and by the State governments. The taxing power is necessary to both governments, and may be exercised by both, without any interference of the one with the operations of the other.

Nor is the case parallel to those cases in which a State Government may act on a subject until the General Government shall see fit to act on the same subject, and thereby supersede the action of the State, as, for example, the passage of a bankrupt law by a State in the absence of any legislation by Congress with regard to bankruptcy. The omission of the General Government to make extradition treaties and enact extradition laws would be the refusal of all extradition, and in this sense it would be positive action on the subject; and if the States having the extradition power were to adopt a different policy then their policy would be repugnant to that of the General Government. No such repugnancy exists when States enact bankrupt laws, where Congress has not legislated at all on the subject.

Nor, again, is extradition parallel to an exercise of the police power of the States, which was considered and sustained by the Supreme Court of the United States in *The City of New York v. Miln*, 11 Pet. 102. The police power of a State operates for the protection and safety of the people of that State, and may, if necessary, extend to the exclusion of any class of persons therefrom, except when the Constitution, or a treaty, or a law of Congress otherwise provides. Such an exercise of power has nothing to do with foreign nations, and involves no intercourse or arrangements with them. It is simply a domestic regulation for the general good.

Extradition, on the other hand, is direct intercourse with a foreign Government. It hears a request from that Government, and decides whether it shall be granted or not. It arrests a fugitive criminal in order to co-operate with a foreign nation in its effort to bring him to justice; and if the arrest and delivery be by a State, then that State passes into the sphere of intercourse and co-operation with such foreign nation, and is exercising a power which is not compatible with a similar power possessed by the General Government.

**3. The Constitutional Prohibition.**— The Constitution, in its first article and in the first clause of the tenth section, declares that “no State shall enter into any treaty, alliance or confederation;” and, in a subsequent clause of the same section, it declares

that no State shall, without the consent of Congress, "enter into any agreement or compact with another State, or with a foreign power."

The first of these prohibitions is absolute and unqualified, and completely excludes all power in the States to make treaties with foreign nations on any subject whatever. The States, of course, cannot make extradition treaties securing the right to demand fugitive criminals from foreign Governments, and contracting the obligation to deliver them up to such Governments.

The second prohibition forbids the States, without the consent of Congress, to enter into any agreement or compact "with a foreign power." The "agreement or compact," as here referred to, is not identical with a formal treaty, which is absolutely forbidden in a previous clause of the section. The words mean any arrangement, negotiation, agreement or compact with a foreign power, though it should not amount to a treaty in the strict sense; and no State, unless with the prior consent of Congress, can enter into any arrangement, negotiation, agreement, or compact on any subject with another State or with a foreign power.

The plain design of both prohibitions is to exclude the States from all official intercourse with foreign nations, and leave all such intercourse to be exclusively managed and conducted by the General Government. They cannot make a treaty, and they cannot, except with the consent of Congress, enter into *any* agreement or compact, either with each other or with a foreign power, even though it should not be a treaty in the technical sense.

It follows that no State can, without such consent, agree in a specific case to deliver up a fugitive criminal to a foreign Government; and if it has no power to make such an agreement, then it has no power to do the thing itself. No State can do what it has no power to agree to do. The delivery of a fugitive criminal to a foreign Government, even without a regular and formal agreement beforehand, would be essentially the same thing as doing it with such an agreement. It would, in that case, be an affirmative response to the request or demand of the foreign Government and an agreement to do the thing requested or demanded, accompanied with the actual doing of it, and would be



just the thing in kind which it is the purpose of the Constitution to forbid and prevent.

Moreover, the delivery of a fugitive criminal to a foreign Government by a State, even with the consent of Congress, supposing this consent to be obtained, would not be admissible, since the power to do so, as already shown, would be repugnant to a similar power vested in the General Government. The agreement or compact with a foreign power which, with the consent of Congress, is admissible, is evidently not of the kind that embraces the extradition of fugitive criminals, since this is provided for in the powers of the General Government, and since it is a part of the foreign intercourse of the United States intended to be exclusively confided to that Government, and especially to the President in the exercise of the treaty-making power. The framers of the Constitution evidently did not mean that Congress, by simply giving its consent, should be able to endow a State with any such power.

**4. The Case of Holmes.** — An application was, in 1840, made to the President of the United States by the authorities of Lower Canada for the arrest and delivery of one George Holmes, on the charge of murder committed in Lower Canada. There was at the time no treaty between the United States and Great Britain for the mutual delivery of fugitive criminals; and the President, holding that he had no authority to comply with such an application, except as authorized by treaty to do so, declined to take any action in the case.

A similar application was then made to Governor Jennison, of Vermont, in which State the fugitive criminal was declared to be domiciled. There was at the time no statute law of that State giving the Governor authority to order the arrest and delivery of fugitive criminals at the request of a foreign Government.

Governor Jennison, however, issued a warrant of arrest, and directed the sheriff of the county of Washington, having arrested Holmes, to convey him to some convenient place on the confines of the State of Vermont and Lower Canada, and there deliver him to such person or persons as might by the Canadian authorities be empowered to receive him. The sheriff executed

the warrant of arrest; but before the delivery was actually effected Holmes sued out a writ of *habeas corpus* from the Supreme Court of Vermont, commanding the sheriff to bring the body of the prisoner into court, and make due return as to the cause of the arrest and detention.

The court, having heard the case, adjudged as follows :

“Wherefore, after a full hearing of the parties, and all and singular the premises aforesaid being seen and fully examined, it is adjudged by the court here that the aforesaid cause of detention and imprisonment of the said George Holmes is good and sufficient in law, and that he be remanded and held accordingly under the process set forth in the return to this writ of *habeas corpus*.”

This decision affirmed and sustained the power of the Governor of Vermont to issue the warrant for the arrest, detention and delivery of Holmes to the Canadian authorities as a fugitive criminal, even without any express statute of the State providing therefor. It assumed that the State, through its executive authority, could make such an arrest and delivery, and that, too, notwithstanding the President of the United States for want of power had declined to act. The Governor of Vermont, in a matter of foreign intercourse, undertook to do what the President decided that he had no power to do; and the Supreme Court of the State affirmed the legality of his action.

The decision being rendered by the highest court of the State of Vermont, Holmes, under the twenty-fifth section of the Judiciary Act of 1789 (1 U. S. Stat. at Large, 73), sued out a writ of error from the Supreme Court of the United States; and this court, being divided in opinion, was not able, as a court, to render any other judgment than that of dismissing the case for want of jurisdiction. (*Holmes v. Jennison*, 14 Pet. 540.) There was, consequently, no positive decision by the court in regard to the specific question involved in the action of Governor Jennison, and decided by the Supreme Court of Vermont.

Chief Justice Taney, however, delivered an elaborate opinion upon the merits of the case, and with him Messrs. Justices Story, McLean and Wayne concurred. The main point in the case he stated as follows: “Can a State, since the adoption of the Con-

stitution of the United States, deliver up an individual found within its territory to a foreign Government, to be there tried for offenses alleged to have been committed against it?" Upon this point he remarked:

"This involves an inquiry into the relative powers of the Federal and State Governments upon a subject which is sometimes one of great delicacy. In the case before us, the party concerned is an obscure individual, not a citizen of the United States, and who is not likely to attract any great share of public attention. But in times of war and high excitement the principle now to be decided may reach cases where great public interests are concerned, and where the surrender may materially affect the peace of the Union. We are fully sensible of the importance of the inquiry, and of the necessity of approaching it with the utmost deliberation and caution."

Having disposed of a preliminary question relating to jurisdiction, Chief Justice Taney, assuming that the General Government possesses the extradition power, denied that the State governments also possess the same power. For this opinion he assigned two reasons, both of which he expanded at length. The first reason is the fact that, according to the express words of the Constitution, the power is one of the powers which the States are forbidden to exercise without the consent of Congress. The second reason consists in the fact that the power would be incompatible and inconsistent with the powers conferred on the Federal Government. The substance of both of these reasons, in a condensed form, has been presented in the preceding argument on the question, and need not be here repeated.

It is true that this deliverance was not an authoritative reversal of the judgment of the Supreme Court of Vermont, but simply an expression of the opinion of Chief Justice Taney and the other three justices who concurred with his views. It, however, had the practical effect of a reversal. The Supreme Court of Vermont soon after revised and reversed its own decision, and ordered the discharge of Holmes from custody, thereby declaring the custody to be unlawful, and also declaring that the Governor of Vermont had no authority for ordering the arrest, detention and delivery of Holmes to the person or persons empowered by

the authorities of Lower Canada to receive him. (*Ex parte Holmes*, 12 Vt. 631.)

**5. The Case of Carl Vogt.**— The same question was, in 1872, considered by the Court of Appeals of the State of New York in *The People, ex rel. Francis C. Barlow, v. Curtis*, 50 N. Y. 321.

The case, as it stood before the court, came up on a writ of error to review the judgment of the Supreme Court at General Term, in the first judicial department, which judgment affirmed the proceedings before the defendant, who was a judge of the Superior Court of the city of New York, which proceedings had been brought into the Supreme Court by a writ of *certiorari*. (46 How. Pr. 171.)

The facts in the case were as follows: A man by the name of Carl Vogt was confined in the prison of the city of New York, upon a commitment to answer an indictment for grand larceny. Upon the request of the Minister of Belgium, who charged Vogt with the crimes of murder, robbery and arson, committed near the city of Brussels, in Belgium, the Governor of the State of New York issued his warrant, directed to the sheriff of the city and county of New York, reciting and setting forth in detail the proof which had been produced before him to show the truth of the charge, specifying the application of the Belgian Minister for the arrest and delivery of Vogt as a fugitive criminal, and ordering the sheriff to deliver him to the person designated by the Belgian authorities, to the end that he might be taken to Brussels and there tried for his crimes.

These proceedings were taken on the 25th of May, 1872, when there was no extradition treaty between the United States and Belgium, and, consequently, when the President of the United States had no authority to deliver up fugitive criminals to the Belgian Government.

The authority under which the Governor of New York acted was that of a statute, originally enacted in 1822, which provided that "the Governor may, in his discretion, deliver over to justice any person found within the State, who shall be charged with having committed, without the jurisdiction of the United

States, any crime except treason, which by the laws of this State, if committed therein, is punishable by death or by imprisonment in the State prison." (1 R. S. of New York, 164.) There is no doubt that this statute of the State of New York authorized the act of the Governor in ordering the arrest and delivery of Vogt. The only question, therefore, was whether the statute itself was consistent with the Constitution of the United States.

To test this question, Vogt sued out a writ of *habeas corpus*, returnable before Judge Curtis, of the Superior Court of the city of New York, who, upon hearing the case, discharged Vogt from the arrest and imprisonment under the Governor's warrant, on the ground that the statute, and the warrant of arrest under it, were in conflict with the Constitution of the United States. The judge ordered the prisoner to be committed to answer the indictment for grand larceny. This proceeding was, upon a writ of *certiorari*, reviewed and affirmed by the Supreme Court of the first judicial department; and then the case was, by a writ of error, carried to the Court of Appeals of the State. Here the judgment of the Supreme Court was affirmed.

The doctrine of the Court of Appeals, as stated in the syllabus of this case, is as follows:

"By the Constitution of the United States, the Federal Government has the exclusive power to regulate, provide for and control the surrender of fugitives from justice from foreign countries. Hence the provisions of the Revised Statutes (1 R. S. 164, §§ 8-11) for such surrender, are unconstitutional; and a warrant issued by the Governor in pursuance thereof is void."

Chief Judge Church delivered the opinion of the court, and repeated briefly but substantially the argument of Chief Justice Taney in the case of Holmes.

These cases, taken in connection with the reasoning elicited by them, leave no point open to doubt as to the general question whether the whole subject of international extradition belongs, under the Constitution, exclusively to the General Government, and, consequently, establish the proposition that the States, as such, have no powers to exercise and no duties to perform in regard to it.

Such extradition is a branch of the foreign intercourse of the United States, with which the States have nothing to do, and in which they cannot participate concurrently with the General Government without exceeding their own sphere as fixed by the Constitution, and passing into the sphere exclusively assigned to that Government.

## CHAPTER III.

## THE TREATY POWER.

The two general questions examined in the preceding chapters are these: 1. Whether the President of the United States, in the absence of a treaty providing therefor, has the power to order the arrest of a person found in this country, and his delivery to a foreign Government, at the request or demand of such Government, and on the charge that the person is an offender against its laws, and has fled to the United States to escape punishment. 2. Whether the States of the Union have the power, under the Constitution, to surrender fugitive criminals to foreign Governments. Both of these questions were answered in the negative.

The next inquiry relates to international extradition, considered with reference to the treaty power vested in the President of the United States. This will be the subject of the present chapter.

**1. Grant of the Power.**—The Constitution of the United States, in article 2, section 2, gives the treaty power to the President in the following words: "He shall have power, by and with the advice and consent of the Senate, to make treaties, provided two-thirds of the Senators present concur." The President, according to this language, possesses the treaty power, subject in its exercise to the limitation imposed by the necessary concurrence of the Senate. No treaty, without this concurrence, is on the part of the United States a completed and binding negotiation.

**2. The Subjects of the Power.**—The terms in which this power is granted are general, with no express restrictions in the grant as to the matters upon which it may be exercised. On this point Mr. Justice Story remarks: "The power to make treaties is by the Constitution general; and, of course, it embraces all sorts of treaties, for peace or war, for commerce or territory, for alliance or succors, for indemnity, for injuries or payment of debts, for the recognition and enforcement of principles of

public law, and for any other purposes which the policy or interests of independent sovereigns may dictate in their intercourse with each other." (Story's Const., § 1508.)

The Supreme Court of the United States, in *The United States v. 43 Gallons, etc.*, 3 Otto, 197, said: "The power to make treaties with the Indian tribes is, as we have seen, co-extensive with that to make treaties with foreign nations. In regard to the latter it is, beyond doubt, ample to cover all the usual subjects of diplomacy."

Chief Justice Taney, in *Holmes v. Jennison*, 14 Pet. 540, spoke thus of the treaty power: "The power to make treaties is given by the Constitution in general terms, without any description of the objects intended to be embraced; and consequently it was designed to include all those subjects which, in the ordinary intercourse of nations, had usually been made subjects of negotiation and treaty, and which are consistent with the nature of our institutions and the distribution of powers between the General and the State Governments."

So, also, in *The People v. Gerke*, 5 Cal. 381, the following doctrine was stated in regard to the scope of this power: "The power to make treaties is given without restraining it to particular objects in as plenipotentiary a form as it is held by any other sovereign in any other community. This principle results from the form and necessities of the Government, as elicited by a general review of the Federal compact. Before the compact, the States had the power of treaty-making as potentially as any power on earth. It extended to every subject. By the compact they expressly granted it to the Federal Government in general terms, and prohibited it to themselves. The General Government must, therefore, hold it as fully as the States held it, with the exceptions that necessarily flow from a proper construction of the other powers granted and those prohibited by the Constitution."

**3. Limitation of the Power.**—The treaty power, though thus extended in its scope, is, nevertheless, not absolutely unlimited. Mr. Justice Story, in the section above referred to, observes: "But though the power is thus general and unrestricted, it is not to be so construed as to destroy the fundamental laws of



the State. A power given by the Constitution cannot be construed to authorize the destruction of other powers given in the same instrument. It must be construed, therefore, in subordination to it, and cannot supersede or interfere with any other of its fundamental provisions."

In *The Cherokee Tobacco Case*, 11 Wall. 616, the Supreme Court of the United States said: "A treaty cannot change the Constitution or be held valid if it be in violation of that instrument." In *The People v. Naglee*, 1 Cal. 231, it was held that a treaty "cannot supersede a State law which enforces or exercises any power of the State not granted away by the Constitution." In *The People v. Washington*, 36 Cal. 658, it was said that "a treaty is but a part of the law of the land, and what is forbidden by the Constitution can no more be done by a treaty than by an act of Congress." In *Pierce v. The State*, 13 N. H. 336, it was held that "the political rights of the people of the several States, as such, are not subjects of treaty stipulations."

In *Marbury v. Madison*, 1 Cranch, 137, the Constitution itself was spoken of as the paramount authority in all cases, rendering acts of Congress invalid when inconsistent therewith; and the same principle undoubtedly holds equally good in reference to treaties. Treaties made since the adoption of the Constitution are made in the exercise of power derived from it; and if in any of their provisions they contradict that instrument, then they must necessarily be so far unconstitutional and void. A treaty cannot directly appropriate money belonging to the United States, since this power is given exclusively to Congress. (*Turner v. The Baptist Missionary Union*, 5 McLean, 344.)

**4. Applicable to Extradition.**— Assuming then, for the present, that extradition treaties are not forbidden by the Constitution, the question whether they come within the scope of the treaty power, as bestowed by that instrument, resolves itself into the inquiry whether extradition is one of the usual subjects of negotiation between nations. There can be but one answer to this question, and that must be in the affirmative.

Mr. Clark, in his treatise on Extradition (2d ed., chap. 2) refers to various early treaties between different countries, having for

their object the mutual surrender of fugitive criminals. The writers on public law, though not entirely agreed as to the extent of the right to demand a fugitive criminal, and the obligation to deliver him up, independently of a treaty, have, nevertheless, discussed the principles involved in the process, and some of them laid down rules by which it should be governed. Extradition, both before and since the adoption of the Constitution, either with or without treaties, is one of the historic facts of usage and practice among European nations; and this shows that it is within the scope of the treaty power, as given to the President, unless some other provision of the Constitution excludes it therefrom.

The courts of this country have had repeated occasion to consider and decide judicial questions arising under extradition treaties and the laws of Congress enacted for their execution; and in no instance have they held either the treaties or the laws to be unconstitutional.

In *Holmes v. Jennison*, 14 Pet. 540, Chief Justice Taney remarked: "And without attempting to define the exact limits of this treaty-making power, or to enumerate the subjects intended to be included in it, it may be safely assumed that the recognition and enforcement of the principles of public law, being one of the ordinary subjects of treaties, were necessarily included in the power conferred on the General Government. And as the rights and duties of nations toward one another, in relation to fugitives from justice, are a part of the law of nations, and have always been treated as such by the writers upon public law, it follows that the treaty-making power must have authority to decide how far the right of a foreign nation in this respect will be recognized and enforced when it demands the surrender of any one charged with offenses against it."

Judge Blatchford, in *In re Angelo De Giacomo*, 12 Blatch. 391, said: "It is not to be questioned that a treaty stipulation, on the part of the Government of the United States, to surrender fugitives from justice, is a lawful stipulation, and within the authority of the treaty-making power."

Mr. Justice Nelson, in *In re Kaine*, 14 How. 103, expressed the opinion that the courts of this country "possess no power to arrest, and surrender to a foreign country, fugitives from justice, except as authorized by treaty stipulations and acts of Congress

passed in pursuance thereof." This implies that such stipulations are a constitutional exercise of the treaty power.

Every nation, possessing the ordinary attributes of sovereignty, and acting through an established Government, must have the power, unless there be some self-imposed restriction upon it in its local constitution, to stipulate for the delivery of fugitive criminals as between itself and other nations. No nation is bound against its own will, or bound by the law of nations, to make its territory a secure asylum for such criminals, or try and punish them for offenses not committed against its own laws or within its own jurisdiction. Whether a nation shall surrender them, that they may be dealt with by the Government whose laws they have violated, is a question for its own discretion.

This discretion, in respect to the United States, the Constitution lodges with the President in the general grant of the treaty power; and unless there be something in the instrument which excludes extradition therefrom, then it necessarily follows that the President, with the advice and consent of the Senate, has ample power to make treaties for this purpose.

**5. Trial by Jury.**— This brings us to the question whether the Constitution contains any provisions with which extradition is inconsistent, and which, therefore, operate as restrictions upon the power of the President to make treaties of this character. One of the provisions of the Constitution, which has been referred to as excluding extradition from the scope of the treaty power, declares that "the trial of all crimes, except in cases of impeachment, shall be by jury."

In the *Case of Jonathan Robbins*, which, under the extradition article of the treaty of 1794 between the United States and Great Britain, came before Judge Bee, of the United States District Court for South Carolina, it was urged "that the Constitution secured the right of trial by jury to the citizens [of the United States], and that treaties and laws altering that were of subordinate authority, and, of course, void."

To this the judge replied as follows: "If we attend to the Constitution, and the amendments which are now a part of it, we shall find that all the provisions there made respecting criminal prosecutions and trials for crimes by a jury are expressly limited

to crimes committed within a State or district of the United States. Indeed, reason and common sense point out that it should be so, for what control can the laws of one nation have over offenses committed in the territories of another? It must be remembered also, that in the article of amendments, where it is provided that no person shall be held to answer for a capital offense, unless on a presentment by a grand jury, an exception is made to cases arising in the land or sea service, or even in the militia when in actual service in time of war or public danger. This shows unequivocally that trial by jury may be dispensed with, even for crimes committed within the United States; and these observations are at once an answer to all the arguments founded on the right of trials by jury, they being expressly limited to crimes committed within the United States, and even then with some exceptions." (Wharton's State Trials, pp. 401, 402.)

The provisions of the Constitution, whether in the body of the instrument, or in the amendments thereto, which require that trials in criminal cases shall be by jury and on the presentment of a grand jury, refer to offenses committed against the United States, and have no relation to such as may be committed against other Governments. Extradition is not a trial at all, but simply a preliminary arrest, examination and delivery of a fugitive criminal, with a view to his trial in the country whose laws he has offended; and hence Judge Bee was clearly right in holding that the constitutional provisions respecting jury trials in criminal cases have no application whatever to such a proceeding.

**6. Extradition and Citizenship.** It was also urged in behalf of Robbins, that he was "a citizen of the United States and a native of Connecticut," and "that the treaty can only relate to foreigners." To this the judge replied that it does not "make any difference whether the offense was committed by a citizen or another person." No reason was given for this opinion; yet the treaty itself, as to the right of demand and the obligation of delivery, made no distinction between citizens and foreigners.

Some of the extradition treaties of the United States expressly provide that neither party shall be required to deliver up its own citizens or subjects, and, of course, under these treaties, there is no obligation of such delivery. Other treaties, however, make

no such provision; and under them there is no distinction between citizens and foreigners, so far as the United States are concerned, unless the Constitution exempts the former from the operation of extradition treaties.

There is no constitutional provision, express or implied, that secures any such exemption to a citizen of the United States. If he goes into a foreign country, he becomes for the time being subject to its municipal laws; and if he violates these laws, then, unless unjustly oppressed contrary to the law of nations, he is not under the protection of the United States, as against trial and punishment therefor by the local authority. His rights of citizenship would afford him no immunity for crime committed in a foreign country. If he should return to the United States as a fugitive from justice, and if by the terms of a treaty his crime were an extradition offense, and still further, if the treaty did not exempt the citizens or subjects of the respective parties from being delivered up for such offenses, then there is nothing in the mere fact of his citizenship to give him such exemption, any more than there is in such citizenship to secure exemption from trial and punishment in the foreign country whose laws he has violated.

Extradition would not be a trial under these laws, but simply an arrest, a detention and a delivery, that the offender might be tried where the offense was committed, and where the jurisdiction for this purpose exists; and, unless the treaty protects him against such extradition on the ground of citizenship, then he would have no protection, any more than if he were a foreigner.

So Judge Bee held in regard to Robbins, even if his citizenship were conceded as a fact. The treaty of 1794 did not exempt him on this ground; and there is nothing in the Constitution to make such a treaty void in its application to citizens of the United States, when demanded as fugitive criminals in accordance with its provisions.

**7. The Fourth and Fifth Amendments.**— In the *Case of Christiana Cochrane*, 4 Op. Att.-Gen. 201, who, in 1843, was arrested and held for delivery as a fugitive criminal under the tenth article of the treaty of 1842 between the United States

and Great Britain, the ground was taken in her petition and remonstrance addressed to the President, and in the argument of her counsel, that this "article of the treaty is itself void, as being repugnant to the Constitution of the United States." The clauses upon which this claim was based are the fourth and fifth articles of the amendments to the Constitution.

The fourth of these articles declares that "the right of the people to be secure in their persons, houses, papers and effects against unreasonable searches and seizures, shall not be violated, and no warrants shall issue but upon probable cause, supported by oath or affirmation, and particularly describing the place to be searched and the persons or things to be seized."

To the argument resting on this clause Attorney-General Nelson thus replied: "Now, I do not understand the provisions of the tenth article of the treaty of 1842 as being at all in conflict with this article of the Constitution, or that, in fulfilling it, as has been done in this case, the right of personal security of the accused has been assailed. The protection guaranteed is not against all seizures; it is against unreasonable seizures; [the seizure] can be made only upon probable cause; and, when authorized, the evidence of its reasonableness is to be furnished by oath or affirmation—all of which prerequisites have been complied with in this case."

This constitutional clause surely protects no one against arrest by the warrant of a magistrate, upon probable cause supported by oath or affirmation, or against an examination and commitment to prison if the evidence be sufficient to justify detention; and this is precisely what is done in giving effect to an extradition treaty. The party accused is arrested and examined upon complaint made under oath, and upon proper evidence of guilt, delivered to the foreign Government demanding him in pursuance of a treaty. There is nothing in this procedure repugnant to the fourth amendment to the Constitution.

The other constitutional clause referred to provides that "no person shall be held to answer for a capital or otherwise infamous crime, unless on presentment or indictment of a grand jury, except in cases arising in the land or naval forces, or in the militia when in actual service in time of war or public danger;" and

further provides that no person shall "be deprived of life, liberty or property without due process of law."

To the argument based on this provision the Attorney-General answered: "Nor do I perceive how it can be supposed that there has been any infraction, by the treaty stipulations, of the fifth article of the constitutional amendments, which, in declaring that no person shall be held to answer for a capital or otherwise infamous crime, unless on a presentment or indictment by a grand jury, was never designed to embrace any other than offenses against the United States. The offense charged by this proceeding is one against the Government of Great Britain, over which the courts of the United States can rightfully exercise no jurisdiction, and for which, in these courts, the accused cannot be required to answer upon or without a presentment or indictment by a grand jury."

This proceeds upon the assumption that the language of the fifth amendment has no application to the offense which is the subject-matter of consideration in an extradition treaty, or to the proceedings under it, since the offense is one against a foreign Government, and over it the United States have no jurisdiction for trial and punishment. The whole object of the arrest, the initiatory examination and the final delivery, is to give the Government, whose laws have been violated, possession of the fugitive criminal, with a view to his trial by the proper authority; and there is nothing in the amendment to preclude this object or the method of attaining it.

The phrase "due process of law," as occurring in this amendment, applies, so far as it has relation to criminal offenses, only to those committed against the United States; and in respect to them it does not forbid the arrest and examination of a person, upon complaint made under oath, or his detention, by the commitment of a magistrate, until his case can be considered by a grand jury. It surely does not forbid the President to make a treaty providing for the arrest and examination of fugitive criminals and their commitment to prison upon adequate evidence, or Congress to enact a law for carrying such a treaty into effect, or the surrender of such criminals, that they may answer in the courts of the country whose laws they have offended. The

phrase has no relation to the questions that arise and are considered in proceedings for the purpose of extradition under a treaty, or to the powers of the President in making such a treaty.

In the *Case of Angelo De Giacomo*, 12 Blatch. 391, the question was presented to the Commissioner, who was conducting the examination, whether the accused could be arrested, held and delivered up, for an offense within the enumeration of the treaty between the United States and the King of Italy, but committed before the date of the treaty. Judge Blatchford, before whom the case was brought upon *habeas corpus* and *certiorari*, decided that the treaty applied to past as well as future crimes, and hence, that, although the offense in this case preceded the treaty, it was not for this reason excluded from its operation.

As to "the restriction, in article four of the amendments to the Constitution, against violating the right of the people to be secure against unreasonable seizures, and the restriction in article five of such amendments, against depriving a person of liberty without due process of law," the Judge said: "They have no relation to the subject of extradition for crime, as regulated by the treaty in question and the statutes of the United States passed on that subject." Holding an extradition treaty, made by the President of the United States, to be "a lawful stipulation, and within the authority of the treaty-making power," he dismissed these amendments without any discussion, on the ground that they have no relation to the subject.

The question was raised in this case whether the constitutional provision that "no bill of attainder or *ex post facto* law shall be passed" is not violated by the treaty as thus interpreted. To the first branch of this question the Judge replied: "A bill of attainder is defined to be 'a legislative act which inflicts punishment without a judicial trial,' where the legislative body exercises the office of judge, and assumes judicial magistracy, and pronounces on the guilt of a party without any of the forms and safeguards of a trial. (*Cummings v. Missouri*, 4 Wall. 323.) This treaty does none of these things, nor do any of the statutes for carrying the treaty into effect contain provisions which fall within such definition."

As to the second part of the question the Judge remarked: "By an *ex post facto* law is meant one which imposes a pun-



ishment for an act which was not punishable at the time it was committed, or imposes additional punishment to that then prescribed, or changes the rules of evidence by which less or different testimony is sufficient to convict than was then required." (*Cummings v. Missouri*, 4 Wall. 326, and *Calder v. Bull*, 3 Dall. 390.)

The Judge held that the treaty, as construed by him, was not an *ex post facto* law, within the proper meaning of this phrase. On this point he observed: "The fact of extradition cannot be properly regarded as punishment, within the sense of that word as used when considering the subject of *ex post facto* laws. There is no offense against the United States, and no trial for any such offense, and no punishment for any such offense. It is true that extradition relates only to criminal offenses, but it relates only to criminal offenses committed abroad; and no treaty for extradition, nor any statute passed in relation to extradition, purports to punish the fugitive for the offense. Both treaties and statutes assume that he is to be tried upon the charge if not already convicted. With the question of punishment, or the kind or degree, they have no concern. They merely declare that the protection of this Government shall not be interposed between the fugitive and the laws which he has violated, and that if he flees hither for such protection the injured Government may take him hence, and shall be aided therein. This Government neither assumes nor exercises any power for the punishment of crime."

It follows, from the very nature of an *ex post facto* law, that the constitutional provision in regard to such laws can have no application to extradition treaties.

**8. The Sixth Amendment.** — Mr. William B. Lawrence, in a letter published in the Albany Law Journal, vol. 16, p. 405, proposed a series of inquiries for legislative investigation, one of which reads as follows:

"Whether extradition, in whatever mode granted, either by treaty or by the executive or other department of the Federal Government, is not a violation of the Constitution of the United States, which was intended to protect, certainly in all cases of Federal cognizance, all persons within our jurisdiction from being held to answer for a capital or otherwise infamous crime with-

out the presentment or indictment of a grand jury, or deprived of life, liberty or property without due process of law, and professes to secure in all criminal prosecutions speedy and public trial by an impartial jury."

The query here presented, so far as it relates to the Sixth Amendment, refers to that clause of the amendment which declares that "in all criminal prosecutions the accused shall enjoy the right to a speedy and public trial by an impartial jury *of the State and district wherein the crime shall have been committed, which district shall have been previously ascertained by law.*"

The words in italics, to which Mr. Lawrence made no reference, show that the amendment relates simply to persons who are to be tried for offenses committed against the United States, and hence that it has nothing to do with the subject of extradition, since the crime for which extradition is sought was not committed within any "State" or "district" of the United States, and since the surrender of a fugitive criminal to a foreign Government, under the stipulations of a treaty, is in no sense a trial of that criminal. The cases referred to in the amendment are those in which the Government of the United States arraigns and tries the accused for offenses against its laws; and these certainly are not cases in which that Government, in pursuance of the stipulations of a treaty, is asked to deliver up fugitive criminals for offenses committed against a foreign Government, in order that the latter, having thus obtained the custody of their persons, may proceed to try and punish them for these offenses.

The Supreme Court of the United States has repeatedly decided that the restrictions contained in the fifth and sixth amendments to the Constitution, and also all restrictions of power found in the Constitution and expressed in general terms, apply only to the Government provided for in that instrument. They have no application to the State governments, and certainly none to the governments of other countries. (*Barron v. The Mayor of Baltimore*, 7 Pet. 243; *Livingston's Lessee v. Moore*, 7 id. 469; *Fox v. The State of Ohio*, 5 How. 410; *Smith v. The State of Maryland*, 18 id. 71; *Pewear v. The Commonwealth*, 5 Wall. 475; *Twitchell v. The Commonwealth*, 7 id.

321; *Edwards v. Elliott*, 21 id. 535; and Sedgwick's Construction of Statutory and Constitutional Law [2d ed.], p. 555.)

If the rights secured by the constitutional limitations imposed on the powers of the General Government are not invaded by treaties for extradition, as is evidently the fact, then it follows that these limitations have no relation to such treaties, or to the power of the President to make them. To give them such a relation is to misapply them.

**9. State Bills of Rights.**—Mr. Lawrence, in the letter above referred to, suggests the inquiry “whether extradition, either with or without treaty, is consistent with *Magna Charta* or the bills of right, as incorporated into the organic laws of all the States of the Union, and which declare, in terms more or less precise, that no member of the State can be disfranchised or deprived of any of the rights or privileges secured to any citizen thereof, unless by the law of the land or by the judgment of his peers.”

The first remark in regard to this query is that the bills of rights, referred to, relate only to those who are citizens of a State, and, consequently, have no application to the extradition of persons who are not such citizens.

A second remark is that whether the extradition of a citizen, under the stipulations and authority of a treaty, is or is not consistent with State bills of rights, is not a material question, since the Constitution makes all treaties of the United States a part of “the supreme law of the land,” and, as such, superior to any State constitution or State law. It gives to the President the treaty power: and if he makes extradition treaties with the advice and consent of the Senate, and if such treaties are not repugnant to the Constitution itself, then they are a part of this “supreme law.” Any thing in State constitutions inconsistent therewith would not displace the authority and operation of these treaties, but the treaties would render such constitutions null and void to the extent of the inconsistency. The treaties would not yield to the constitutions, but the latter would yield to the former. (*Ware v. Hylton*, 3 Dall. 199; *Owings v. Norwood's Lessee*, 5 Cranch, 344; *Fairfax's Devisee v. Hunter's*

*Lessee*, 7 Cranch, 603; and *Worcester v. The State of Georgia*, 6 Pet. 515.)

A third remark is that the rights secured by State bills of rights in behalf of citizens have no relation whatever to the subject of extradition conducted and regulated by the authority of the United States. Such bills of rights are simply designed to protect the citizen against usurpations and abuses of power by State authority, and, hence, they furnish him no protection against any proceeding which is authorized by the Constitution of the United States. He cannot take an appeal from the latter to the former or supersede the latter by the former. The latter is "the supreme law" as to his rights.

**10. Conclusion.**—The conclusion, derivable from this survey of the subject, is that extradition treaties come fully within the scope of the treaty power as given to the President, subject to the qualification of the Senate's approval by the requisite majority, and that there is nothing in any part of the Constitution which excludes such treaties from the exercise of the power. The doctrine is well settled in this country that it is only through such treaties that extradition can be had at all. The whole question, therefore, as to extradition, as to the making of treaties for this purpose, as to the crimes that shall be enumerated, as to the terms upon which mutual delivery shall be granted, and as to the nations with which the treaties shall be made, is, by the Constitution, submitted to the sound discretion of the President, subject to the limitation imposed by the power of the Senate.

Where nations are widely separated from each other, and have but few facilities of intercourse, and especially where they are very different in the type of their civilization and their criminal codes, such treaties are much less necessary and far less expedient than between nations that are co-terminous, and whose codes for the trial and punishment of crime are substantially similar. No civilized country would think of making such a treaty with a nation of barbarians. The object of extradition is not to furnish an opportunity for cruelty and oppression in dealing with criminals, but to promote the general interests of enlightened justice.

The Government of the United States does not permit the criminal laws of other countries to operate within its own territory, and does not extend its laws to offenses committed elsewhere than under its own jurisdiction. It tries and punishes offenders against its own laws and leaves other nations to do the same. Adopting this principle, it must either furnish an asylum to all fugitive criminals who may take refuge in this country, or enter into treaty stipulations for their surrender to the Governments against whose laws they have offended. The latter is the policy which the Presidents of the United States have judged it expedient to adopt, as shown by the number of treaties which, with the approval of the Senate, they have negotiated for this purpose since 1842.

All nations are interested in the discouragement and suppression of crime; and extradition, under the stipulations and with the limitations and safeguards of a treaty, seems an appropriate means to this end. It is the only method of attaining the end in the class of cases to which it applies, unless nations undertake in their respective courts, and in cases where the offenders have sought safety by flight, the work of trying and punishing crimes committed against each other. There is no reason to suppose that the United States will ever adopt this expedient as a substitute for extradition. It contradicts the fundamental principle of American jurisprudence which requires that crimes shall be tried and punished under the law of the place where they were committed. Whatever objections there may be against extradition, they are far less serious than those against such an expedient.

Extradition pronounces no judgment upon the laws of other countries, and exercises no judicial power in the trial of criminals, or the administration of punishment. It simply says that fugitives from justice shall not, by flight from the jurisdiction of the laws which they have violated, be protected against arrest in the country to which they have fled, and that, upon proper evidence of their guilt, they shall be returned to that jurisdiction for trial and punishment.

Treaties to this end are a rational and just exercise to the treaty power. The object to be attained is worthy of the method; and it is clearly better that the principles governing the method should

be settled beforehand by a mutual understanding and agreement between nations, rather than to leave the whole question to be determined in each specific case. Nations, in this way, place themselves in the friendly attitude of mutual service in respect to a matter in which they have a common interest.

## CHAPTER IV.

## EXTRADITION TREATIES.

**1. Enumeration of treaties.** — The volume of Public Treaties, published under the authority of Congress in 1875, contains twenty-five treaties of the United States that make provision for international extradition. Stated in the order of their respective dates, and designated by the foreign nations with which they were made, they are the following:—

Great Britain, August 9, 1842; France, November 9, 1843, with a supplementary article, February 24, 1845, and another article, February 10, 1858; Hawaiian Islands, December 20, 1849; Swiss Confederation, November 25, 1850; Prussia and other States, June 16, 1852; Bremen, September 6, 1853; Bavaria, September 12, 1853; Wurttemberg, October 13, 1853; Mecklenburg-Schwerin, November 26, 1853; Mecklenburg-Strelitz, December 2, 1853; Oldenburg, December 30, 1853; Schaumburg Lippe, June 7, 1854; Hanover, January 18, 1855; Two Sicilies, October 1, 1855; Austria, July 3, 1856; Baden, January 30, 1857; Sweden and Norway, March 21, 1860; Venezuela, August 27, 1860; Mexico, December 11, 1861; Hayti, November 3, 1864; Dominican Republic, February 8, 1867; Italy, March 23, 1868, with an additional article, January 21, 1869; Nicaragua, June 25, 1870; Orange Free State, December 22, 1871; and Ecuador, June 28, 1872.

To these treaties are to be added the extradition stipulation of May 23, 1870, with the Republic of Salvador; that of September 12, 1870, with Peru; that of August 11, 1874, with the Ottoman Empire; that of January 5, 1877, with Spain; that of May 22, 1880, with the Netherlands; and that of June 13, 1882, with Belgium, superseding the treaty of March 19, 1874.

These six treaties, being added to the twenty-five contained in the volume of Public Treaties, published in 1875, make in all thirty-one extradition treaties of the United States with foreign Governments. The oldest of these treaties is the one with Great Britain, which was made in 1842. A still earlier treaty on this

subject was that of 1794 with Great Britain, which expired by its own limitation in 1806.

**2. General principles.** — The general principles which characterize all these treaties, and in respect to which they are essentially similar, are the following:

(1.) *Reciprocal rights and duties.* — The one common purpose of these stipulations is to establish, as between the contracting parties, the reciprocal right, upon the terms specified, to demand and impose a corresponding obligation to deliver fugitive criminals who, having committed offenses within the territorial jurisdiction of the one, have fled from justice and sought refuge within that of the other.

How far a political sovereignty will concede the right and assume the obligation is always a question for its own determination. The modern practice of nations is to settle the point by treaties beforehand, in which they pledge their faith to each other, and define the cases in which, and the conditions upon which, extradition will be granted. This is the only basis of such extradition recognized or acknowledged by the United States. The case of Arguelles, considered in a previous chapter, is an exception to this rule; yet, as shown in that chapter, the extradition in his case was without any proper legal authority whatever. It stands alone as the only case of the kind in the whole history of the Government.

(2.) *Extradition Crimes.* — Each of these treaties agrees with every other in relating only to crimes as the ground of extradition; and each specifies the particular crimes for which extradition may be had as between the contracting parties. The crimes thus specified in the twenty-five extradition stipulations contained in the volume of Public Treaties, taken collectively, are the following: 1. Arson. 2. Assassination. 3. Assault with intent to commit murder. 4. Burglary. 5. Circulation or fabrication of counterfeit money. 6. Counterfeiting public bonds, bank bills, securities, stamps, dies, seals, and marks of state and administrative authority, etc. 7. Embezzlement of the public money. 8. Embezzlement by public officers. 9. Embezzlement by persons



hired or salaried. 10. Utterance of forged paper. 11. Forgery. 12. Infanticide. 13. Kidnapping. 14. Larceny of cattle or other goods and chattels of the value of twenty-five dollars or more, found only in the treaty with Mexico. 15. Murder. 16. Mutiny. 17. Mutilation. 18. Parricide. 19. Piracy. 20. Poisoning. 21. Rape. 22. Robbery.

To this list the treaty with Peru adds bigamy, fraudulent bankruptcy, fraudulent barratry and severe injuries intentionally caused on railroads, to telegraph lines, or to persons by means of explosions of mines or steam boilers. The treaty with Belgium specifies twelve classes of crimes for which extradition may be had, and in the list places abortion, the willful and unlawful destruction or obstruction of railroads, which endangers human life, and also the reception of articles obtained by means of any one of the crimes provided for in the treaty. Putting all the extradition treaties of the United States together, we have now some thirty forms of crime specified in one or more or all of these treaties.

These crimes are designated by titles known and acknowledged, as between the contracting parties, to mean the same offenses, or they are made the subjects of special description. When the designation is simply by titles, and these titles are furnished by different languages, titles that are equivalents in meaning are used. These names mean things; and neither of the contracting parties can, by local legislation, change the nature and character of the crimes that are the subjects of the stipulation, and thus in effect create new ones, and then claim extradition for these new crimes on the mere basis of names.

Sometimes, for the purpose of greater certainty, extradition crimes are specifically defined. Thus, in the supplemental article of February 24, 1845, added to the treaty of 1843 with France, burglary is placed in the extradition list, defined to be "breaking and entering by night into the mansion-house of another with intent to commit felony." Should either Government, for its own purposes, see fit to establish a different grade of burglary the offense would not be the one defined in the treaty, and hence would not, under the treaty, be an extradition crime.

It was on this ground that Judge Fancher, in *Lagrange's Case*, 14 Abb. Pr. (N. S.) 333, said that the crime of burglary, in the

sense meant in the treaty with France, "refers to the common-law offense of burglary," and that the treaty does not "provide for the demand and extradition of a fugitive for our statutory offense of burglary in the third degree." The proceedings in this case he held to be "unauthorized and illegal," because the crime charged was not the one specified in the treaty.

The treaty of June 13, 1882, with Belgium, defines burglary "to be the act of breaking and entering by night into the house of another with the intent to commit felony," and also defines robbery "to be the act of feloniously and forcibly taking from the person of another money or goods by violence or putting him in fear." Where a treaty thus defines a crime, that definition cannot be changed or enlarged, but must be strictly followed in the application of the treaty. The definition given in the contract must be the rule of its administration.

(3.) *The Rule of Evidence.* — The general rule of evidence adopted in the extradition treaties of the United States is, that the charge of criminality on which the demand for delivery is based must be supported by such evidence as would justify the apprehension and commitment for trial of the person accused, if the alleged offense had been committed in the country on which the demand is made. The laws of that country, and not those of the one making the demand, furnish this rule; and in this respect each Government administers its own laws without reference to those of the other. The obligation of delivery is qualified by this rule, since it is a part of the contract.

If the local laws of the place where the case of the alleged fugitive is examined allow persons arrested and examined on the charge of crime to testify in their own behalf, then, under the general rule of evidence, this particular rule must be applied in the case of such fugitive. This doctrine was laid down by Judge Blatchford in the case of *In re Francois Farez*, 7 Blatch. 345, 357. The prisoner, in the United States, is entitled to make a defense, and, in such circumstances, to testify in his own behalf. (Whart. Plead. and Prac. [8th ed.], § 56.)

Many of the treaties of the United States, for the purpose of applying the rule of evidence, expressly authorize "the judges and other magistrates" of the contracting Governments to issue

their warrants for the apprehension of accused persons, to examine into the question of their alleged criminality, and if satisfied that the evidence is sufficient to detain them for trial, to certify this fact to "the proper executive authority." Other treaties give the rule of evidence, but contain no such provision for its application, and hence leave the matter to be determined by legislation in each country.

(4.) *The Surrender.* — The actual delivery of fugitive criminals is, in all these treaties, to be preceded by a demand of one Government upon the other, made by the supreme political authority of the demanding State, or by ministers or officers duly authorized for this purpose. The stipulation of the contracting parties is to deliver up such fugitives, "upon mutual requisitions," in the cases and upon the evidence specified, subject to whatever qualifications may be annexed thereto.

All these treaties, with the exception of three, either expressly or by obvious implication, assign the function of delivery to the executive authority of the respective Governments; and in these three there is no mention and no direct implication as to the authority by which the delivery is to be made.

The question whether the crime charged in a specific case comes within the description of the treaty under which the case arises, and if so, then whether the evidence by which it is proved comes within the rule of evidence prescribed by the treaty, is to be decided by the Government to which the requisition for delivery is addressed. The demanding Government must, in order to sustain its claim, make out such a case; and whether it has done so or not is for the other party to the treaty to determine. It is only in that case that the treaty obligation of delivery exists at all.

Such, in brief, are the general principles which are common to all the extradition treaties of the United States. They all specify rights and duties as between the contracting parties. They all relate to crimes as the ground of extradition. Those upon whom they operate are persons who, being guilty of offenses against one of the parties, have sought refuge and safety or are found within the jurisdiction of the other. These persons, in order to be extradited, must be formally charged with the crime,

or crimes, for which the extradition is asked ; and the proof sustaining the charge must be such as is set forth in the treaties. The crimes charged must be within the list of the offenses enumerated as grounds of extradition, in the particular treaty under which the charge is made. The right to make the charge and demand the surrender is a treaty right ; and when the stipulated conditions have been supplied in a given case, the duty of delivery is one of treaty obligation.

**3. Special Provisions.**—The extradition treaties of the United States, while similar in their general character and objects, are, nevertheless, distinct and separate compacts, each containing its own terms, and binding the faith of the respective Governments accordingly, without reference to the terms which may be incorporated into other treaties. As to details, they exhibit in their special provisions the law of variety, as well as that of unity in their general principles. These special provisions may be arranged into the following classes :

(1.) *The List of Crimes.*—While all of these treaties specify particular crimes as those for which extradition may be obtained, they do not all make precisely the same list of extradition offenses. In some treaties the list is much larger than in others. The twenty-seventh article of the treaty of 1794 with Great Britain named only the crimes of murder and forgery as coming within its provisions ; and the tenth article of the treaty of 1842 with Great Britain, while including these crimes, added five others, thus making a list of seven extradition crimes. The treaty of March 3, 1868, with Italy, makes a list of eight such crimes ; and that of June 13, 1882, with Belgium, enumerates twelve crimes, some of which have diversity as to their minor shades.

The contracting parties, in each case, make such a list of crimes as they judge to be conducive to the ends of justice in view of their relations to each other. As a general rule, only those crimes that are of a heinous character, and which all nations agree in regarding as such, are the subjects of extradition treaties. The minor offenses, except in a few instances, are omitted altogether.

(2.) *Citizens or Subjects.* — Twenty of these treaties, in express terms, exclude from their operation the citizens or subjects of the country on which the demand is made; and this so qualifies the general stipulation that neither party is bound to deliver up to the other its own citizens or subjects. Where there is no such express exclusion on the ground of citizenship, and nothing in the terms of a treaty to imply it, as is the fact with some of these treaties, there citizenship secures no immunity against delivery, provided the crime on which the demand is based comes within the list of crimes specified in the treaty under which the demand is made.

So Judge Bee held in the case of *Jonathan Robbins*. (Wharton's State Trials, p. 403.) Every nation, unless there is something to the contrary in its local constitution, has the right to deliver up its own citizens who have committed offenses against other Governments, and fled to its territory for asylum; and if it has made a treaty providing for the delivery of fugitive criminals, with no exception in favor of its own citizens or subjects, then the question of citizenship is immaterial, considered in relation to the obligation imposed by the general terms of the treaty. The presumption is that, if it had intended to make such an exception, it would have incorporated the fact into the treaty itself.

(3.) *Political Offenses.* — In twenty of these treaties political offenses are expressly excluded from their application, without any specific definition of their nature; and this leaves the contracting parties, especially the one asked to make the delivery, to decide, in each case, whether the offense set forth in the charge and demand is of this character. If it be such, then there is no obligation to surrender the party accused, since he is expressly excepted from the operation of these treaties. Treason and sedition are political offenses, and hence fall within the limits of the exception.

The treaty with the Two Sicilies excludes such offenses "unless the political offender shall also have been guilty of some one of the crimes enumerated in article twenty-two," in which case the implication is that, though he is a political offender, he may be

demand, and, with proper evidence, must be delivered, for this other crime.

The treaty of May 22, 1880, with the Netherlands, provides that it "shall not apply to any crime or offense of a political character, nor to acts connected with such crimes or offenses," and that no person surrendered under the provisions of this treaty "shall in any case be tried or punished for a crime or offense of a political character, nor for any act connected therewith, committed previously to his extradition."

The treaty of June 13, 1882, with Belgium, while containing the same general provision in respect to the person surrendered for any of the crimes specified therein, qualifies the same by saying, "unless he has been at liberty to leave the country for one month after having been tried, and, in case of condemnation, for one month after having suffered his punishment, or having been pardoned." This implies that the extradited party, having had such liberty to leave the country to which he was extradited, may, if he remains therein thereafter, be tried and punished for a political offense committed previously to his extradition.

The same treaty also provides that "an attempt against the life of the head of a foreign Government, or against that of any member of his family, when such attempt comprises the act either of murder or assassination, or of poisoning, shall not be considered a political offense or an act connected with such an offense." This was doubtless designed to apply to such a case as the assassination of President Garfield.

Those treaties, on the other hand, that contain no express provision as to delivery on the ground of political offenses, leave the question to be settled in the light of their general stipulations. They do not enumerate such offenses as extraditable, and hence there can be no extradition for them.

So, also, a person, extradited for some other offense within the enumeration, cannot thereafter be tried for a purely political crime antedating his extradition, since the general implication of the extradition treaties of the United States, in the absence of an express stipulation otherwise, requires, as will be shown in another connection, that a party surrendered shall be tried only for the offense which was the ground of the surrender. The fact that

political offenses are nowhere mentioned in the list of extradition crimes is equivalent to their exclusion therefrom, and also to the exemption of surrendered criminals from any trial therefor.

The general sense of civilized nations, especially in modern times, is that merely political offenders are not proper subjects for extradition; and any nation that, having obtained the custody of a fugitive upon other grounds, should put him on trial for a political offense, would be deemed guilty of a gross act of bad faith, and that, too, whether the treaty under which the extradition was secured did or did not contain an express stipulation to the contrary.

(4.) *Limitation as to Time of the Crime.* — Express provision is made in eight of these treaties that the general stipulations shall have no application to crimes committed before their date; and in three other treaties a similar provision is made with reference to crimes that precede the date of the exchange of ratifications. There can, of course, be no extradition for such crimes in consistency with these treaties, and there should be no trial for crimes expressly excluded by the date of their commission, whether they are mentioned in the extradition list or not.

In other extradition treaties of the United States there is no such provision; and in the case of *Angelo De Giacomo*, 12 Blatch. 891, who was extradited under the treaty between the United States and the King of Italy, Judge Blatchford held, there being no stipulation precluding its application to crimes committed before the date of the treaty, that it was applicable to such offenses, if within the enumeration, as well as to those committed subsequently to its date. The theory of this decision is that the date of the offense, as compared with that of the treaty, has nothing to do with the application of the latter, unless there be a special stipulation in relation to this point.

Two of the extradition treaties of the United States expressly declare that no surrendered person shall be tried for any crime committed previously to that for which his surrender was asked, and four of them apply the same principle in respect to "any ordinary crime" antedating the one stated in the requisition.

The treaty of January 5, 1877, with Spain, declares that "no person shall be subject to extradition in virtue of this convention

for any crime or offense committed previous to the exchange of the ratifications hereof, and no person shall be tried for any crime or offense other than that for which he was surrendered, unless such crime be one of those enumerated in article II, and shall have been committed subsequent to the exchange of the ratification hereof."

The same treaty also declares that "a fugitive criminal shall not be surrendered under the provisions hereof when from lapse of time or other lawful cause, according to the laws of the place within the jurisdiction of which the crime was committed, the criminal is exempt from prosecution or punishment for the offense for which the surrender is asked." A similar provision is contained in the treaty of May 22, 1880, with the Netherlands, and in that of June 13, 1882, with Belgium.

(5.) *Postponement of Surrender.* — Twenty-two of these treaties stipulate that in those cases in which the persons demanded have committed crimes within the jurisdiction of the country whose asylum they have sought, and have been there arrested, or are undergoing prosecution or punishment therefor, extradition may be deferred until after their acquittal or the expiration of their punishment.

(6.) *Demand by Two or More Countries.* — The treaty of January 5, 1877, with Spain, provides that "if a fugitive criminal claimed by one of the parties hereto shall be also claimed by one or more powers, pursuant to treaty provisions, on account of crimes committed within their jurisdiction, such criminal shall be delivered in preference, in accordance with that demand which is the earliest in date." A similar provision is made in the treaty of 1880, with the Netherlands, and in that of 1882, with Belgium.

(7.) *Extradition to a Third Country.* — The treaty of 1882, with Belgium, provides that without the consent of the Government delivering up the fugitive criminal, he shall not, by the Government receiving him be extradited to a third country, except "when the accused shall have asked of his own accord to be tried or to undergo his punishment, or when he shall not have," within one month after his discharge, left the country to which he was extradited.



(8.) *The Case of Convicts.*—In all of these treaties the stipulation includes fugitives charged with crime and demanded for trial and punishment; and in eleven of them it is extended also in express terms, to fugitives already convicted of crime. The same general rule of evidence, as to the proof of the crime, is applied in both cases; yet, in the case of fugitive convicts, some of the treaties make a special regulation.

The treaty of August 11, 1874, with the Ottoman Empire, provides that "if the person whose extradition may be asked for shall have been convicted of a crime, a copy of the sentence of the court in which he may have been convicted, authenticated under its seal, and an attestation of the official character of the judge by the proper executive authority, and of the latter by the Minister or Consul of the United States or of the Sublime Porte, respectively, shall accompany the requisition."

The treaty of January 5, 1877, with Spain, provides that "if the fugitive criminal shall have been convicted of the crime for which his surrender is asked, a copy of the sentence of the court before which such conviction took place, duly authenticated, shall be produced."

Provisions of this character define the evidence upon which this class of fugitives shall be surrendered. The surrender in their case is not for trial, but simply for punishment, since they are assumed to have been already tried and sentenced.

These special provisions, found in some of the extradition treaties of the United States, operate, of course, only in cases arising under the treaties that contain them. Each treaty, being distinct from all the others, and having no dependence upon them in respect to its provisions and obligations, furnishes its own rule. What can and should be done under it is to be decided solely by its terms.

**4. Interpretation of these Treaties.**—The interpretation of these treaties follows the general law applicable to all treaties. They are specific contracts between nations, and are to be construed according to the natural and fair sense of the terms in which their stipulations are expressed. Vattel having, in his *Law of Nations*, p. 248, enumerated a variety of rules for the con-

struction of treaties, sums up the result as follows: "From all these incontestable truths results this rule: In the interpretation of treaties, compacts and promises we ought not to deviate from the *common* use of the language unless we have very strong reasons for it."

Ex-President Woolsey in his *International Law*, p. 185, thus states the substance of the rule: "The ordinary *usus loquendi* obtains unless it involves an absurdity. When words of art are used the special meaning which they have in the given art is to determine their sense."

The Court of Appeals of Kentucky, in *The Commonwealth v. Hawes*, 13 Bush, 697, said: "Public treaties are to be fairly interpreted, and the intention of the contracting parties to be ascertained by the application of the same rules of construction and the same course of reasoning which we apply in the interpretation of private contracts."

The Supreme Court of the United States in *The United States v. D'Auterive*, 10 How. 609, said: "Compacts between Governments or nations, like those between individuals, should be interpreted according to the natural, fair and received acceptance of the terms in which they are expressed." This is the sense in which the terms were used. All men are assumed to employ words in the received sense, unless they, at the time, qualify the sense by a special notice. Courts proceed upon this principle in expounding contracts and administering justice between parties. Treaties, whether for extradition or for any other purpose, are no exception to the rule.

Moreover, what is obviously implied in extradition treaties is as really a part of them as if it had been formally and expressly stated. They are to be executed, and this involves a process; and whatever naturally and fairly results from their express provisions, unless excluded by other provisions, is to be regarded as a part of the stipulation. And so whatever is by obvious implication forbidden, or is inconsistent with the plain letter and intent of these treaties, is excluded, and cannot in good faith be done by either party.

The parties limit their power relatively to each other, by the provisions of the compact, express or implied, and their faith is

bound accordingly. The fact that they have chosen to make a treaty for the mutual surrender of fugitive criminals implies that this is the mode in which they have determined to regulate the subject; and hence, all their rights and all their obligations in reference to this question are to be considered and decided in the light of the treaty. The treaty itself is their rule.

5. **The Treaty of 1794.** — The first extradition stipulation entered into by the United States is the one found in the twenty-seventh article of the treaty of 1794 with Great Britain, which, by the next article was limited to the period of twelve years, and hence ceased to be operative after 1806. The article reads as follows:

“It is further agreed that His Majesty and the United States on mutual requisitions, by them respectively, or by their respective ministers or officers authorized to make the same, will deliver up to justice all persons who, being charged with murder or forgery, committed within the jurisdiction of either, shall seek an asylum within any of the countries of the other, provided that this shall only be done on such evidence of criminality as, according to the laws of the place where the fugitive or person so charged shall be found, would justify his apprehension and commitment for trial, if the offense had there been committed. The expense of such apprehension and delivery shall be borne and defrayed by those who make the requisition and receive the fugitive.”

This contract specified murder and forgery as the crimes for which extradition might be demanded. It designated the agency through which the demand might be made, and gave the rule of evidence as to the criminality of the accused person, and, hence, as to the obligation of compliance with the demand. It pledged the good faith of each Government to conform its policy to the terms of the stipulation. It was upon its face a contract that contemplated action *in futuro*, and, hence was an *executory* contract, and not one executed by the mere ratification of the treaty. It, however, omitted to provide, in express terms, any agency or authority for making the delivery of a fugitive criminal, or for applying the rule of evidence as to criminality; and Congress never passed any law for carrying it into execution.

The only case which occurred under this treaty was that of

Jonathan Robbins, in 1799, a report of which is given in Wharton's State Trials, pp. 392-457. Robbins, on suspicion of having been concerned in the mutiny on board the British frigate *Hermione* in 1791, was arrested in 1799 in Charleston, South Carolina, and committed to prison, before any demand for delivery was made by the British Government. After he had been imprisoned for about six months, Judge Bee, United States District Judge for that State, was informed by the Secretary of State that a demand had been made upon the President for his delivery as a fugitive criminal, and also notified that the President, if the evidence was sufficient to sustain the charge, advised and requested him to deliver the prisoner to "the consul or other agent of Great Britain who shall appear to receive him."

Robbins was soon after brought before the District Court on *habeas corpus* and Judge Bee, after hearing the case, ordered him to be surrendered "to the British consul, or such person or persons as he shall appoint to receive him." He subsequently addressed a letter to the Secretary of State, informing him of his "compliance with the request of the President of the United States," and saying that he judged the evidence against Robbins sufficient to sustain the charge on which he had been demanded.

This case produced an intense excitement among the people, and led to a warm discussion in the House of Representatives. It was claimed by some that the court had no jurisdiction to make the delivery, and by others that the President could not execute the stipulation until authorized to do so by an act of Congress. Mr. John Marshall, subsequently Chief Justice of the Supreme Court of the United States, was then a member of the House of Representatives; and, in the speech which he made on the subject, he defended the action of the President, taking the ground that, while the courts have no power "to seize any individual and determine that he shall be adjudged by a foreign tribunal," the President, being charged with the duty of executing the laws, and a treaty being declared by the Constitution to be a law, had power to make the delivery in the absence of any legislation by Congress.

The fact in the case was that Judge Bee issued the order for delivery; and, according to the argument of Mr. Marshall, he

had no authority, as a judge, to do so. The authority was with the President; and, as a matter of fact, he did not exercise it. What he did was to advise and request the judge to make the delivery if the evidence was sufficient. In his letter of May 21, 1799, to the Secretary of State, he said: "How far the President of the United States would be justifiable in directing the judge to deliver up the offender is not clear. I have no objection to advise and request him to do it."

This advice and request plainly conferred no authority upon Judge Bee, when hearing a case upon *habeas corpus*, and determining whether the prisoner was lawfully restrained of his liberty. The argument of Mr. Marshall, while it logically condemns the action of Judge Bee, does not fit that of the President. It claims for him a power which he did not exercise, but which he advised and requested Judge Bee to exercise.

The delivery was a judicial one, and was not officially the act of the President at all. The judge of a court did what, as Mr. Marshall asserted, the President only had the authority to do, and not the less so because he was requested by the latter to do it. The advice of the President given to a judge in hearing a *habeas corpus* case is no basis for the exercise of power.

Chief Justice Marshall, in delivering the opinion of the Supreme Court of the United States in *Foster v. Neilson*, 2 Pet. 253, said; "Our Constitution declares a treaty to be the law of the land. It is consequently to be regarded in courts of justice as equivalent to an act of the legislature, whenever it operates of itself without the aid of any legislative provision. But when the terms of the stipulation import a contract, when either of the parties engages to perform a particular act, the treaty addresses itself to the political, not the judicial department; and the legislature must execute the contract before it can become a rule for the court." The same court re-affirmed this doctrine in *The United States v. Arredondo*, 6 Pet. 691.

The twenty-seventh article of the treaty of 1794 with Great Britain was a contract in which the parties mutually pledged their faith with respect to action *in futuro*, but in which they made no provision as to the agency for the delivery of fugitive criminals. They simply agreed that the delivery should be made

in the cases and circumstances stated. The contract did not by its own terms execute itself, and, hence, needed legislation to make it operative, and, hence, was not, in the absence of the requisite legislation, "the law of the land" for courts. Courts, according to the principle laid down in *Foster v. Neilson, supra*, could exercise no power under it until Congress should legislate for its execution.

Was the article "the law of the land" for the President? It certainly was not so in express terms. The President has power to make treaties. These treaties, if self-executing without the aid of legislation, are laws of the land; yet it is not a constitutional prerogative of his office to execute treaties, any more than it is to execute the Constitution, except as he is authorized to do so.

Attorney-General Wirt, in *Sullivan's Case*, 1 Op. Att.-Gen. 509, said: "The Constitution and the treaties and acts of Congress made under its authority comprise the whole of the President's powers." In this case there was no law of Congress, authorizing the President to deliver fugitive criminals, and no provision in the treaty giving the authority; and, according to the doctrine stated in *Foster v. Neilson*, the extradition stipulation was not "a law of the land," because it was a contract which did not and could not execute itself without legislation. It may have been the duty of Congress to supply the appropriate legislation; but its failure to do so certainly did not add to the powers of the President. Legislative omissions are not a source of positive powers to any department of the Government.

The proper conclusion then is, that the surrender of Robbins was without legal authority. The treaty gave Judge Bee no authority to make the surrender, and the President could give him none. The President himself had no such authority; and if he had, he did not directly exercise it. It was stated, in the debate in the House of Representatives, that President Washington had expressed strong doubts whether this part of the treaty of 1794 could be carried into effect without the action of Congress.

**6. The Treaty of 1842.** — The next extradition stipulation of the United States is contained in the tenth article of the treaty

of August 9, 1842, with Great Britain, which provides as follows:

"It is agreed that the United States, and Her Britannic Majesty shall, upon mutual requisitions by them, or their Ministers, officers or authorities, respectively made, deliver up to justice all persons who, being charged with the crime of murder, or assault with the intent to commit murder, or piracy, or arson, or robbery, or forgery, or the utterance of forged paper, committed within the jurisdiction of either, shall seek an asylum, or shall be found within the territories of the other: Provided that this shall only be done upon such evidence of criminality as, according to the laws of the place where the fugitive or person so charged shall be found, would justify his apprehension and commitment for trial, if the crime or offense had there been committed; and the respective judges and other magistrates of the two Governments shall have power, jurisdiction and authority, upon complaint made under oath, to issue a warrant for the apprehension of the fugitive or person so charged, that he may be brought before such judges or other magistrates, respectively, to the end that the evidence of criminality may be heard and considered; and if, on such hearing, the evidence be deemed sufficient to sustain the charge, it shall be the duty of the examining judge or magistrate to certify the same to the proper executive authority, that a warrant may issue for the surrender of such fugitive. The expense of such apprehension and delivery shall be borne and defrayed by the party who makes the requisition and receives the fugitive."

This differs from the treaty of 1794, in increasing the number of extradition crimes to seven, and in providing that the judges and other magistrates of the respective Governments shall have power to arrest and examine alleged fugitives, and, if the evidence of criminality be sufficient, to certify the fact to "the proper executive authority," that a warrant for surrender may be issued.

In *The Matter of the British Prisoners*, 1 Woodb. & Minot, 66, Judge Woodbury interpreted the words "the proper executive authority" to mean, in their application to the United States, the President acting in such matters through the State Department, whose acts are to be regarded as his and by his authority. He also said that, "where the aid of no such act of Congress seems necessary in respect to a ministerial duty devolved on the Executive by the supreme law of a treaty, the Executive need not wait

and does not wait for acts of Congress to direct such duties to be done." This case occurred in 1845, before Congress had passed any extradition law; and the view of Judge Woodbury was, that the treaty of 1842, in its terms and without any legislation for its execution, by clear implication, gave the President authority to make the delivery of fugitive criminals.

Attorney-General Nelson, in *The Case of Christiana Cochrane*, 4 Opp. Att.-Gen. 201, adopted this construction, and advised the President to make the surrender of the alleged criminal.

These two cases are the only ones that occurred under the treaty prior to the act of Congress providing for the execution of extradition treaties; and in both no legislation was thought necessary to give effect to the treaty.

An attempted extradition under the treaty of November 9, 1843, with France, brought this question distinctly before Congress; and the result was the enactment of a law in 1848 for carrying into execution all such treaties. The treaty with France expressly provided that the surrender, on the part of the United States, "shall be made only by authority of the executive thereof." It, however, did not provide for any preliminary arrest and examination by the magistrates of either country.

In 1847 a demand was made for the surrender of Nicholas Lucien Metzger by the French Minister, on the charge of forgery in France; and the executive authority at Washington, declining to act in the first instance, referred him to the courts.

Metzger was afterward arrested in the city of New York, on a warrant issued by a police magistrate; and the magistrate, after examining the case, deemed the evidence sufficient, and committed him to prison to await the order for extradition from the President. He was, on *habeas corpus*, released from prison by a Circuit judge of the State of New York, who held that the magistrate had no jurisdiction over the matter. He was subsequently arrested on a warrant issued by Judge Betts, of the United States District Court, who, after hearing the case, held that it came within the terms of the treaty with France; that the evidence was sufficient to detain the accused, and that, the treaty being a part of the supreme law of the land, no act of Congress was needed to carry it into execution. The judge committed him to



prison, to await the action of the President. (1 Edm. Select Cases, 399.)

An application was then made to the Supreme Court of the United States for a writ of *habeas corpus*, to review the action of Judge Betts; and the court, upon hearing the case, refused to grant the writ, on the ground that, the District judge having exercised a special authority at chambers, and there being no provision by law for a revision of his judgment, the court had no jurisdiction in the matter. (5 How. 176.)

The President of the United States then issued his order, commanding the marshal in New York to deliver the prisoner to the diplomatic agents of the French Government. Before this order was executed, Judge Edmonds, a Circuit judge of New York, granted a writ of *habeas corpus* which brought the accused before him; and after the case was twice argued, he discharged him, giving an elaborate opinion directly the reverse of that of Judge Betts.

"This case," said the judge, "involves the question whether the President of the United States has authority, by virtue of mere treaty stipulation, and without an express enactment of the national legislature, to deliver up to a foreign power, and virtually to banish from the country, an inhabitant of one of the sovereign States of our confederacy." The conclusions to which he came, after considering the question at large, are the following: 1. That "a treaty containing provisions to be executed *in futuro* is in the nature of a contract, and does not become a rule for the courts until legislative action shall be had on the subject." 2. That "the treaty with France of 1843, providing for the surrender of fugitives from justice, cannot be executed by the President of the United States without an act of Congress." (*The Matter of Metzger*, 1 Barb. 248.)

This simply applies the principle stated in *Foster v. Neilson*, *supra*, and also in *Turner v. The American Baptist Missionary Union*, 5 McLean, 344. If the treaty-making power can pledge the faith of the United States in respect to future acts, and independently of and without the legislation of Congress, commit the execution of treaties to the President, thus in effect constituting him the sole judge of their meaning and the occasions and manner of their fulfillment, then it is theoretically a very dangerous

power, because capable of the most enormous abuses. The President acts independently of Congress when exercising the treaty power; and if he be equally independent in respect to the execution of treaties, then he may, with the consent of the Senate, place the whole matter in his own hands, without the restraints or guidance of law, except as thus made.

The fact that a treaty, whether for extradition or any other purpose, is a part of "the supreme law of the land," no more makes it self-acting and self-executing without legislation, than does the fact that the Constitution is such a law make it self-acting and self-executing. Nearly all the powers granted in the latter are brought into operation by legislative action. Why should not the same rule apply to the contracts made in treaties, especially when their stipulations do not upon their face act *in presenti*, but provide for things to be done only *in futuro*? Such treaties address themselves to the legislative power of Congress, and are to be executed by its aid and co-operation.

## CHAPTER V.

## EXTRADITION LAWS.

The Act of August 12, 1848 (9 U. S. Stat. at Large, 302), entitled "An Act for giving effect to certain treaty stipulations between this and foreign Governments, for the apprehension and delivering up of certain offenders," was the first legislation of Congress on the subject of international extradition. It followed soon after the decision of Judge Edmunds in the case of Metzger, referred to in the previous chapter. The title of the act seems to recognize the correctness of the view which he took in that case.

This act was supplemented by the Act of June 22, 1860 (12 U. S. Stat. at Large, 84). The Revised Statutes of the United States, in sections 5270-5277, reproduce, as follows, the provisions of these two acts:—

**1. The Arrest and Examination of the Fugitive Criminal (sec. 5270).**— This section provides as follows:

"Whenever there is a treaty or convention for extradition between the Government of the United States and any foreign Government, any justice of the Supreme Court, circuit judge, district judge, commissioner authorized so to do by any of the courts of the United States, or judge of a court of record of general jurisdiction of any State may, upon complaint made under oath, charging any person found within the limits of any State, District or Territory, with having committed within the jurisdiction of any such foreign Government any of the crimes provided for by such treaty or convention, issue his warrant for the apprehension of the person so charged, that he may be brought before such justice, judge or commissioner, to the end that the evidence of criminality may be heard and considered. If, on such hearing, he deems the evidence sufficient to sustain the charge under the provisions of the proper treaty or convention, he shall certify the same, together with a copy of all the testimony taken before him, to the Secretary of State, that a warrant may issue upon the requisition of the proper authorities of such foreign Government for the surrender of such person, according to the stipulations of the treaty or convention; and he shall issue

his warrant for the commitment of the person so charged to the proper jail, there to remain until such surrender shall be made."

This provides the judicial agency for arresting any person charged with crime under any extradition treaty, and also examining the evidence of his criminality, and certifying the same to the Secretary of State if the evidence be deemed sufficient to sustain the charge.

**2. Documentary Evidence (sec. 5271).** — This section, as amended by the Act of June 19, 1876 (19 U. S. Stat. at Large, 59), provides as follows :

"In every case of complaint and of a hearing upon the return of the warrant of arrest, any depositions, warrants or other papers offered in evidence, shall be admitted and received for the purpose of such hearing if they shall be properly and legally authenticated, so as to entitle them to be received as evidence of the criminality of the person so apprehended, by the tribunals of the foreign country from which the accused party shall have escaped, and copies of any such depositions, warrants or other papers shall, if authenticated according to the law of such foreign country, be in like manner received as evidence; and the certificate of the principal diplomatic or consular officer of the United States resident in such foreign country shall be proof that any such deposition, warrant, or other paper, or copy thereof, is authenticated in the manner required by this section."

This does not change the rule that the evidence of criminality must be such as would justify the commitment of the accused for trial, if the alleged offense had been committed in the country on which the demand is made. It simply provides that certain documentary evidence shall be received and considered, if properly authenticated.

**3. Surrender of the Fugitive (sec. 5272).** — This section provides as follows :

"It shall be lawful for the Secretary of State, under his hand and seal of office, to order the person so committed to be delivered to such person as shall be authorized, in the name and on behalf of such foreign Government, to be tried for the crime of which such person shall be so accused, and such person shall be delivered up accordingly; and it shall be

lawful for the person so authorized to hold such person in custody, and to take him to the territory of such foreign Government, pursuant to such treaty. If the person so accused shall escape out of any custody to which he shall be committed, or to which he shall be delivered, it shall be lawful to retake such person in the same manner as any person accused of any crime against the laws in force in that part of the United States to which he shall so escape, may be retaken on an escape."

This authorizes the Secretary of State as the representative of the President in conducting the foreign relations of the United States to make the surrender of the fugitive criminal, and provides for the arrest of the criminal in the event of his escape from the custody to which he may have been committed. The statute does not declare that the delivery *shall* be made when the accused, after a judicial examination, has been committed to prison to await the executive order of the Government, but simply says that "it shall be lawful," implying that the question of such delivery, even after such examination and commitment, is to be determined by the executive authority, and that this authority has a right to review all the evidence in the case, and judge accordingly.

**4. Time allowed for Extradition (sec. 5273).** — This section provides as follows :

"Whenever any person who is committed under this Title or any treaty, to remain until delivered up in pursuance of a requisition, is not so delivered up and conveyed out of the United States within two calendar months after such commitment, over and above the time actually required to convey the prisoner from the jail to which he was committed, by the readiest way, out of the United States, it shall be lawful for any judge of the United States or of any State, upon application made to him by or on behalf of the person so committed, and upon proof made to him that reasonable notice of the intention to make such application has been given to the Secretary of State, to order the person so committed to be discharged out of custody, unless sufficient cause is shown to such judge why such discharge ought not to be ordered."

This limits the time within which the accused, after his examination, may be held in prison for extradition ; and if he is

not delivered up within that time, then he may be discharged altogether in the way prescribed, unless sufficient cause is shown to the judge to whom the application is made why the discharge should not be ordered.

**5. Limitation of the Provisions (sec. 5274).** — This section provides as follows :

“The provisions of this Title relating to the surrender of persons who have committed crimes in foreign countries shall continue in force during the existence of any treaty of extradition with any foreign Government, and no longer.”

The effect of this declaration is to confine the operation of the law strictly to the execution of extradition treaties, and, of necessity, to limit the powers which it grants exclusively to that function. The obvious implication is that, in the absence of such treaties, there is no authority for any extradition at all. The only law relating to the subject, enacted by Congress, expressly limits its own application to the execution of these treaties.

**6. Protection of the Accused when delivered to the United States (sec. 5275).** — This section provides as follows :

“Whenever any person is delivered by any foreign Government to an agent of the United States, for the purpose of being brought within the United States and tried for any crime of which he is duly accused, the President shall have power to take all necessary measures for the transportation and safe-keeping of such accused person, and for his security against lawless violence, until the final conclusion of his trial for the crimes or offenses specified in the warrant of extradition, and until his final discharge from custody or imprisonment for or on account of such crimes or offenses, and for a reasonable time thereafter, and may employ such portion of the land or naval forces of the United States, or of the militia thereof, as may be necessary for the safe-keeping and protection of the accused.”

This relates to the transportation, safe-keeping, and protection of the accused person, who has been surrendered to the United States in pursuance of a treaty, and authorizes the President to adopt all necessary measures for these purposes.

**7. Powers of the Agent appointed to receive the Accused (sec. 5276).—**This section provides as follows:

“Any person duly appointed as agent to receive, in behalf of the United States, the delivery, by a foreign Government, of any person accused of crime committed within the jurisdiction of the United States, and to convey him to the place of his trial, shall have all the powers of a marshal of the United States, in the several districts through which it may be necessary for him to pass with such prisoner, so far as such power is requisite for the prisoner's safe-keeping.”

This fully arms the agent, appointed by the President of the United States to receive a fugitive criminal delivered up by a foreign Government under the stipulations of a treaty, with all necessary power to transport him to the place of trial.

**8. Penalty for opposing the Agent (sec. 5277). —**This section provides as follows:

“Every person who knowingly and willfully obstructs, resists or opposes such agent in the execution of his duties, or who rescues or attempts to rescue such prisoner, whether in the custody of the agent or of any officer or person to whom his custody has been lawfully committed, shall be punishable by a fine of not more than one thousand dollars, and by imprisonment for not more than one year.”

**9. The Act of August 3, 1882. (22 U. S. Stat. at Large, 215). —**This act, designed to be supplementary to the provisions contained in the Revised Statutes of the United States, provides as follows:

(1.) *Extradition Practice.* (Sec. 1.) — That all hearings in cases of extradition under treaty stipulation or convention shall be held on land, publicly, and in a room or office easily accessible to the public.

(2.) *Commissioners Fees.* (Sec. 2.) — That the following shall be the fees paid to commissioners in cases of extradition under treaty stipulation or convention between the Government of the United States and any foreign Government, and no other fees or compensation shall be allowed to or received by them:

- (a.) For administering an oath, ten cents.
- (b.) For taking an acknowledgment, twenty-five cents.
- (c.) For taking and certifying depositions to file, twenty cents for each folio.
- (d.) For each copy of the same furnished to a party on request, ten cents for each folio.
- (e.) For issuing any warrant or writ, and for any other service, the same compensation as is allowed clerks for like services.
- (f.) For issuing any warrant under the tenth article of the treaty of August 9, 1842, between the United States and the Queen of the United Kingdom of Great Britain and Ireland, against any person charged with any crime or offense as set forth in said article, two dollars.
- (g.) For issuing any warrant under the provision of the convention for surrender of criminals, between the United States and the King of the French, concluded at Washington, November 9, 1843, two dollars.
- (h.) For hearing and deciding upon the case of any person charged with any crime or offense, and arrested under the provisions of any treaty or convention, five dollars a day for the time necessarily employed.

(3.) *Subpœna of Witnesses.* (Sec. 3.) — That on the hearing of any case under a claim of extradition by any foreign Government, upon affidavit being filed by the person charged setting forth that there are witnesses whose evidence is material to his defense, that he cannot safely go to trial without them, what he expects to prove by each of them, and that he is not possessed of sufficient means, and is actually unable to pay the fees of such witnesses, the judge or commissioner before whom such claim for extradition is heard may order that such witnesses be subpoenaed; and in such cases the costs incurred by the process and the fees of witnesses shall be paid in the same manner that similar fees are paid in the case of witnesses subpoenaed in behalf of the United States.

(4.) *Witness Fees, etc., certified.* (Sec. 4.) — That all witness fees and costs of every nature in cases of extradition, including the fees of the commissioner, shall be certified by the judge



or commissioner before whom the hearing shall take place to the Secretary of State of the United States, who is hereby authorized to allow the payment thereof out of the appropriation to defray the expenses of the judiciary; and the Secretary of State shall cause the amount of said fees and costs so allowed to be reimbursed to the Government of the United States by the foreign Government by whom the proceedings for extradition may have been instituted.

(5.) *The Evidence on the Hearing.* (Sec. 5.) — That in all cases where any depositions, warrants, or other papers, or copies thereof, shall be offered in evidence upon the hearing of any extradition case under Title 66 of the Revised Statutes of the United States, such depositions, warrants, and other papers, or the copies thereof, shall be received and admitted as evidence on such hearing, for all the purposes of such hearing, if they shall be properly and legally authenticated, so as to entitle them to be received for similar purposes by the tribunals of the foreign country from which the accused party shall have escaped, and the certificate of the principal diplomatic or consular officer of the United States resident in such foreign country, shall be proof that any deposition, warrant, or other paper, or copies thereof, so offered, are authenticated in the manner required by this act.

(6.) *Repealing Clause.* — The act approved June 19, 1876, entitled "An act to amend section 5271 of the Revised Statutes of the United States," and so much of said section 5271 of the Revised Statutes of the United States as is inconsistent with the provisions of this act are hereby repealed.

The fifth section of the act of 1882 differs in some respects from section 5271 of the Revised Statutes of the United States, and so far as it differs, it furnishes the rule to be observed in extradition cases. The other sections are supplementary to previous provisions of law on the subject of extradition.

These provisions of law, designed to give effect to extradition treaties, and deriving their constitutional authority from this fact, not only imply their own necessity, but also empower and direct the requisite judicial and executive agency for this purpose, and that, too, without any interference with the terms of these

treaties. The Government of the United States has made treaties with other Governments relating to the arrest and restoration of deserting seamen from foreign vessels; and section 5280 of the Revised Statutes of the United States provides for the execution of these treaties so far as they are operative in this country, assuming the necessity of legislation to carry them into effect. Precisely the same assumption is made in the legislation that relates to treaties for the extradition of fugitive criminals.

Both classes of treaties pledge the faith of the United States; and it is difficult to see how the President can, by virtue of the powers vested in him, in the absence of legislation, constitutionally supply the necessary judicial and executive machinery, with the appropriate rules and regulations, for carrying these treaties into effect. There is not a single extradition treaty of the United States that does not leave undetermined a variety of important questions that can be settled only by legislation, and hence, not one that does not need law as an auxiliary to its execution. That law neither the President nor the judiciary can supply. Congress has supplied it, and thus put an end to a question that was once the subject of conflicting opinions.

The English Extradition Act of 1870 contains a provision which forbids the actual delivery of a fugitive criminal until after "the expiration of fifteen days from the date of his being committed to prison to await his surrender;" and also another provision which makes it the duty of the committing magistrate to inform the prisoner "that he will not be surrendered until after the expiration of fifteen days, and that he has a right to apply for a writ of *habeas corpus*." Similar provisions should be incorporated into the extradition law of the United States.

## CHAPTER VI.

## LIMITATION OF THE JURISDICTION.

1. **The Nature of Extradition.** — Bouvier in his Law Dictionary defines Extradition to mean "the surrender by one sovereign State to another, on its demand, of persons charged with the commission of crime within its jurisdiction, that they may be dealt with according to its laws."

This surrender is not simply expulsion, leaving the person free to go elsewhere, but arrest and transference to the Government demanding him on the charge of crime. It, consequently, denies to the accused the right of asylum, and, by a summary process, removes him from the territory and protection of the laws of the surrendering Government, and forcibly places him within the jurisdiction and operation of the laws of the Government to which he is remanded. It gives the latter possession of his person for the purpose of trial and punishment, and is, hence, an auxiliary process through which one Government contributes to the administration of justice by another.

The necessity for extradition grows out of the fact that, except in cases specially provided for by treaty, the penal laws of one country cannot operate within the jurisdiction of another. The sovereignty of a nation within its own territory is exclusive and absolute. (*Schooner Exchange v. McFadden*, 7 Cranch, 116.)

Governments, not choosing blindly, to trust each other on this subject, require information as to the person to be delivered, as to the crime or crimes with which he is charged, and as to the evidence showing the commission of such crime or crimes. The demanding Government must first make out a case; and whether it has done so or not, in any particular instance, the Government upon which the demand is made will always judge for itself.

The nature of the transaction, as between the two Governments, naturally raises the question whether the jurisdiction acquired by extradition is *general*, and may be extended to the trial and punishment of any crime, or *special*, and must, therefore, be limited to the avowed purpose for which it was granted on the

one hand and acquired on the other. The demanding Government specifies a case; and if a surrender be made on the basis of the specification, then it is made with reference to that case, and not to some other supposable case.

The mere statement of the facts as to demand and delivery would seem to imply, as a matter of good faith, that the proceeding necessarily qualifies the jurisdiction which it secures, and limits it to the purpose for which it was secured. Hence arises the doctrine that the party accused can be tried and punished only for the crime or crimes named in the demand and delivery, and that, when this end has been gained, he should, unless he elects to remain, or commits some other crime after his extradition, be permitted to return to the jurisdiction from which he was removed.

Whether this, in the absence of specific stipulations otherwise permitting, is the true construction of extradition treaties, including those of the United States with foreign Governments, will be the special inquiry of this chapter. This, in the case of Winslow, was the great point of diplomatic controversy between the United States and Great Britain.

**2. Opinions of Text-writers.**—Mr. Wharton, in his *Criminal Law*, seventh edition, vol. 3, p. 34, section 2956, *a*, says: "The sole object of extradition is to secure the presence of the fugitive in the demanding State for the purpose of trying him for a specified crime. The process is not to be used for the purpose of subjecting him collaterally to criminal prosecutions other than that specified in the demand. Provisions guaranteeing to the fugitive the right to leave the demanding country after his trial for the offense for which he is surrendered, in case of acquittal, or in case of conviction, after his endurance of punishment, are incorporated in many treaties. When not, they should be made the subject of executive pledge. It is an abuse of this high process, and an infringement of those rights of asylum which the law of nations rightly sanctions, to permit the charge of an offense for which extradition lies to be used to cover an offense for which extradition does not lie, or which it is not considered politic to invoke."

Mr. David Dudley Field, in his International Code, has a chapter on extradition, the provisions of which, as he says, "are based mainly on those of existing treaties, particularly the numerous American treaties and the most recent French treaties." In section 237 he states the following rule: "No person surrendered \* \* \* shall be prosecuted or punished in the nation to which he is surrendered, for any offense committed previous to that for which his surrender was demanded, nor for any offense which was not mentioned in the demand." This represents the law as derived from the provisions of "existing treaties," and as Mr. Field thinks it ought to be.

An article appeared in the American Law Review, vol. 10, p. 617, understood to have been written by Judge Lowell, of the United States Circuit Court, in which the author says: "The question is a simple one; the answer, to an ordinary mind, seems equally so; and the writers on the general subject have expressed but one opinion upon it, so far as they have expressed any. It is, whether a person, surrendered by one Government to another upon charge and proof of the commission of a certain crime, can lawfully, and against the objection of the surrendering Government, be tried for a different crime committed before his surrender. That he cannot, seems at once the dictate of common sense and of ordinary justice; and so are the authorities. \* \* \* We hold it to be clear, on grounds of reason and authority, that a person surrendered by one sovereign to another, under a treaty of extradition, is to be tried for that crime, and that only, for which the surrender was asked and obtained."

The article was prepared with reference to the controversy between the United States and Great Britain, then pending, in regard to the case of Winslow.

Mr. William Beach Lawrence, in an article published in the Albany Law Journal, vol. 14, p. 96, writes as follows: "All the right which a power asking an extradition can possibly derive from the surrender must be what is expressed in the treaty, and all rules of interpretation require the treaty to be strictly construed; and, consequently, when the treaty prescribes the offenses for which extradition can be made and the particular testimony to be required, the sufficiency of which must be certi-

fied to the executive authority of the extraditing country, the State receiving the fugitive has no jurisdiction whatever over him, except for the specified crime to which the testimony applies."

Mr. Lawrence supports this general position by referring to Billot, MM. Faustin-Hélie, Legraverend, Trébutien, Bertauld, Le Sellyer, Morin, Foelix et Demangeat, Brouchoud, Ducrocq, Duverdy, Bonafos, Morel, Dalloz and Mangin.

Mr. Frederick W. Gibbs published a pamphlet on *Extradition Treaties*, in London, in 1868, in which he says that political offenses are not grounds of extradition, and then adds: "In close connection with the foregoing principle, and designed undoubtedly to support it, follows another, to which our attention has been much directed, but which is treated by foreign writers as well established,—that a person surrendered is liable only for the offense on account of which his extradition was obtained." This doctrine he sustained by citing several authorities.

The Lord Chancellor of England, in his speech on the *Winslow* case in the House of Lords, published in *The Foreign Relations of the United States for 1876*, pp. 286–296, presents an array of European authorities to show "that apart altogether from the wording of treaties, there is a silent and implied condition in extradition that the crime for which the surrender of a man is asked must be specified, and that it is for that crime alone that he must be tried."

One of these authorities is Foelix, who, in his treatise on *Private International Law*, devotes an entire chapter to the subject of extradition, and, among others, lays down the following general rule in regard to it:

"The person who is surrendered cannot be prosecuted or condemned, except for the crime in respect to which his extradition has been obtained."

A second authority is Kluit, an eminent jurist of Holland, who, in answer to the question whether it is "lawful to punish the fugitive for any other crime than that for which he has been surrendered," says:

"The request for the surrender of a criminal is generally accompanied by a statement of the grounds on which it is made. The State in which he has taken refuge ought not to surrender him until those grounds have been made clear to it; in other words, it should ascertain whether the crime committed is of a character to justify his surrender. In truth, the criminal, by his flight to another State, becomes (although but for a time) the subject of the supreme power of that State, and immediately enjoys the protection and guardianship of that State. From that guardianship he cannot be forcibly taken, except under special agreement, the terms of which, we presume, certainly do not extend further than to those very grounds on which the surrender was demanded and granted. \* \* \* \* The surrendering State gave up the criminal on consideration of the grounds stated, not of any different grounds."

Kluit's idea is that an extension of the jurisdiction beyond the grounds stated would be a violation of the faith involved in the transaction.

A third authority is Heffter, the German writer, who says:

"The individual whose extradition has been granted cannot be prosecuted nor tried for any crime except that for which the extradition has been obtained. To act in any other way, and to cause him to be tried for other crimes or misdemeanors, would be to violate the mutual principle of asylum and the silent clause contained by implication in every extradition."

### 3. The Doctrine of the French Minister of Justice. —

The circular of the French Minister of Justice, issued April 15, 1841, is also quoted. In this circular the Minister says: "The extradition declares the offense which leads to it, and this offense alone ought to be inquired into. So that if during the prosecution for the crime which has led to the extradition there should arise the evidence of a new crime, a new demand of extradition ought to be made."

The case of *Dermenon*, as reported in Dalloz's Jurisprudence, is mentioned by the Lord Chancellor. Dermenon had been surrendered by the Canton of Geneva to France on the charge of fraudulent bankruptcy. On that charge he was acquitted, but there was another charge against him for which he had not been surrendered. The question arose whether he should be tried on this other charge or sent back to the Canton of Geneva. The answer given by the Minister of the Interior was as follows:

“It is only as accused of the crime of fraudulent bankruptcy that Dermenon has been delivered up to France by the Canton of Geneva. He is now purged of that charge by the decree of acquittal. Dermenon is, therefore, in the same position as if only a misdemeanor had been laid to his charge. It is clear that in that case his extradition could not have been obtained. It follows that we cannot take advantage of his having been given up to the French authorities upon a different ground to try him for acts which have not, and could never have been, the grounds of his extradition. The Minister of Justice has consequently directed the Procureur-Général to place Dermenon at your disposal, and I hasten, for my part, to request you to have him immediately conducted to the frontier, where he should be placed once more in the hands of the Genevese authorities.”

**4. English Extradition Act of 1870.** — The English Extradition Act of 1870 embodies, in express terms, the principle set forth by these authorities. The nineteenth section of the act provides that “where in pursuance of any arrangement with a foreign State, any person accused or convicted of any crime, which if committed in England, would be one of the crimes described in the first schedule to this act, is surrendered by that foreign State, such person shall not, until he has been restored or had an opportunity of returning to such foreign State, be triable or tried for any offense committed prior to the surrender in any part of Her Majesty’s dominions, other than such of the said crimes as may be proved by the facts on which the surrender is grounded.”

So, also, the third section of the act provides that “a fugitive criminal shall not be surrendered to a foreign State unless provision is made by the law of that State, or by arrangement, that the fugitive criminal shall not, until he has been restored or had an opportunity of returning to Her Majesty’s dominions, be detained or tried in that foreign State for any offense committed prior to his surrender, other than the extradition crime proved by the facts on which the surrender is grounded.”

Great Britain, since the passage of this law, has negotiated extradition treaties with Germany, Belgium, Italy, Denmark, Austria, Sweden and Norway, and Brazil, in each of which the contracting parties expressly stipulate that the surrendered fugitive shall be tried only for the extradition crime, until he has been

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restored or had the opportunity of returning to the country from which he was removed. This clearly indicates the view of these respective Governments as to the nature and purpose of the extradition remedy.

**5. United States Treaties — General Provisions.** — The provisions contained in the extradition treaties of the United States may be arranged into two classes: the first class embracing those which are *general*, because common to all these treaties; the second, those which are *special*, being found in some treaties, but not in others. The provisions belonging to the first class relate to the crimes for which extradition may be demanded, and to the procedure necessary to obtain the extradition, involving the formal charge of some one or more of these crimes and also adequate proof of the same.

Now, it is true that, in these general provisions, it is nowhere expressly stipulated that the crime charged in the demand, and which was the basis of the delivery, is the only one committed before the extradition, for which the surrendered party may be tried under the custody thus acquired. Is this principle, though not formally stated, so implied in these provisions that it is to be taken as a part of the treaties, unless there be some express stipulation otherwise? We propose to consider this question, and for this purpose take the tenth article of the treaty of 1842, with Great Britain, the construction of which was the subject of controversy in the *Winslow* case, remarking that as to the points to which we shall refer, it is an example of every extradition treaty of the United States. That part of the article which will be the basis of this argument reads as follows:

“It is agreed that the United States and Her Britannic Majesty shall, upon mutual requisitions by them, or their Ministers, officers, or authorities, respectively made, deliver up to justice all persons who, being charged with the crime of murder, or assault with intent to commit murder, or piracy, or arson, or robbery, or forgery, or the utterance of forged paper, committed within the jurisdiction of either, shall seek an asylum or shall be found within the territories of the other; provided, that this shall only be done upon such evidence of criminality as, according to the laws of the place where the fugitive or person so charged shall be found, would justify his apprehension and commitment for trial if the crime or offense had there been committed.”

Upon this language we submit the following comments :

(1.) *Delivery to Justice.* — The stipulation declares that the respective Governments will, “upon mutual requisitions” made in the manner prescribed, “*deliver up to justice*” a specified class of persons, indicated by the crime or crimes laid to their charge, by the *locus delicti*, or place where the offense or offenses were committed, and by the place where they have sought asylum or are found. The “justice” here referred to is manifestly not the general justice of either country, but justice only in relation to the offenses specified as extradition crimes; and hence it embraces only so much of the penal code as relates to these crimes. It is limited as to the persons to whom, and the offenses to which it applies. Judge Benedict, in *The United States v. Lawrence*, 13 Blatch. 295, said that the delivering up to justice, as provided for in the treaty, is “a significant and comprehensive expression, plainly importing that the delivery is for the purposes of public justice, without qualification.”

This, with all due respect to the learned judge, is inconsistent with the specification of particular crimes as the only ones for which the delivery will be made at all. Why upon this theory specify such crimes? Why not, according to the view advocated by Mr. Westlake, dismiss all enumeration of offenses, and deliver up for any crime, except that of treason or sedition? Such a treaty would be in harmony with the doctrine of Judge Benedict, if we exclude Mr. Westlake’s exceptions: but it so happens, that the extradition treaties of the United States are not constructed upon this principle. They all limit and qualify the “justice” to which they refer, by specifying the crimes for which the delivery may be demanded, and with proper conditions must be granted.

(2.) *The Enumeration of Crimes.* — The stipulation enumerates seven specific crimes as the only ones in respect to which either party shall have the right of demand or be subject of the obligation of delivery. Other treaties contain a larger list of such crimes; yet they all agree in making a definite enumeration. Both parties restrict themselves to a specific list of offenses; and this, by the clearest implication, excludes the jurisdiction from all other crimes preceding the extradition, as effectually as if such exclusion had been stated in express words, unless there be some

provision to the contrary. The legal maxim, *expressio unius personae vel rei est exclusio alterius*, has here a pertinent illustration.

To assume that extradition may be demanded for any one or more of the crimes enumerated, and that the person being surrendered may then, at the pleasure of the demanding Government, be tried and punished for any other crime, is to render alike meaningless and useless the specific enumeration of crimes. The assumption is manifestly not consistent with the fact of such enumeration, and in practical effect changes the treaty itself. Extradition is a means of promoting the administration of justice in respect to a certain class of particularly designated crimes; and, in omitting all other classes, the parties virtually stipulate that the jurisdiction acquired shall operate only within the limits of the crimes enumerated.

To carry the jurisdiction beyond these limits is to make the treaty serve an end for which it contains no provision, and which, moreover, the contracting Governments disclaim by the most obvious implication. The enumeration is the boundary which they have chosen to fix; and hence, after jurisdiction has been acquired within this boundary, the party acquiring it cannot exceed the limitation in the application of the remedy, without violating the agreement.

If it be said that the stipulation relates simply to the crimes for which one may be extradited, and has no relation to the crime for which being extradited, he may then be tried, the answer is that the extradition and the trial, though distinct in time from each other, are nevertheless so connected that the limitations and restrictions that apply to the former apply equally to the latter. Extradition gives a custody for a specified purpose, and the treaty right to demand this custody clearly involves the obligation not to use it for any other purpose. The doctrine of trial for any offense, as the legitimate sequel of extradition under the terms and specifications of a treaty, while trifling with these terms and specifications, and rendering them wholly inoperative except for gaining possession of the fugitive, in practical effect, makes the two Governments say to each other: "We mutually agree to surrender to each other fugitive criminals for the following specified offenses, and will do so in any case in which one or

more of said offenses, having been duly charged by the one party, shall be proved to the satisfaction of the other, with the understanding, however, that the person surrendered in accordance with this agreement may be tried for any offense, whether it comes within the terms of the agreement or not."

The difficulty with this understanding, which is simply the above doctrine put into express words, is that it renders the specific character of the agreement as to crimes alike nugatory and senseless. It would according to this theory, be sufficient merely to agree to extradition for any offense, without any stipulation as to particular crimes. The fact that nations have not so agreed shows that this is not their understanding of the extradition remedy, and that it is their understanding that the terms of the extradition reach to the custody which it secures, and to the purposes for which that custody may be used.

Some of the extradition treaties of the United States expressly provide that neither party shall be required to deliver up its own citizens, which is equivalent to saying that neither will, in respect to such citizens, furnish any facility to the other, for bringing them to justice for any offense which they may commit against its laws; and, hence, if, under such a treaty, either party should by mistake deliver up one of its citizens, it clearly would not be allowable for the other to put that citizen on trial upon the pretext that the terms of the treaty relate only to the extradition, and have no relation whatever to the trial, either as to the person or the offense to be tried.

Such a proceeding, however, would be no greater violation of the letter and intent of the treaty than it would be to use the custody gained by extradition for the trial of the party on a charge for which he was not and could not have been extradited. The only difference between the two cases would be, that in the one the terms which relate to citizenship, and in the other those that relate to the surrender of the person accused, would be the terms violated. The violation would be equally real in both.

(3.) *The Charge of Crime.*—The stipulation requires that the person, claimed by the demanding Government, shall be "charged" with having committed within its jurisdiction some one or more of the crimes enumerated. The delivering Govern-

ment is entitled to know what the offense is for which the surrender is demanded. In no other way can it determine whether it comes within the treaty or not. No offense outside of the treaty is a ground for extradition; and no offense within the treaty is such a ground until it has been distinctly stated to the Government asked to make the delivery.

This statement of a particular offense, as the ground of the right claimed, limits the demanding Government to that offense, since, if a delivery be made, it will be made for that offense and for no other. It is for the crime charged that the delivering Government withdraws from the accused the right of asylum afforded by its own laws; and the receiving Government cannot extend its penal jurisdiction to some other crime, whether within the extradition list or not, without going beyond the terms of its own demand when made, and beyond those of the surrender when granted.

The necessity of making a specific charge as the basis of the demand under the treaty, and the surrender of the alleged fugitive upon that basis, and upon no other, constitute a just and proper limitation of the jurisdiction to the purpose for which it was asked on the one hand, and granted on the other. To exceed this purpose in respect to any antecedent crime is both to exceed and violate the treaty, unless there be a special provision in it which allows such a procedure. Whether there are any such special provisions in the extradition treaties of the United States we shall inquire in the sequel of this discussion.

(4.) *The Evidence of Crime.* — The stipulation further provides that the "criminality" charged in the demand shall be proved by such evidence "as, according to the laws of the place where the fugitive or person so charged shall be found, would justify his apprehension and commitment for trial, if the offense had there been committed." This provision, in its substance found in every extradition treaty of the United States, is a very important one in relation to the point under consideration.

The "criminality" referred to is a particular criminality, and the express words of the stipulation require that the proof thereof shall show a *prima facie* case of guilt, according to the laws of the country asked to make the delivery. The proof must make out

such a case as would justify the apprehension and commitment of the accused party if he had committed the offense in that country. The delivering Government, and not the one making the demand, is by the terms of the treaty in regard to evidence the final judge as to the propriety of the demand, and also as to the sufficiency of the evidence in its support. It applies its own rule of evidence to the case, and withholds or grants the surrender under that rule. This right is secured to it by treaty.

Now, to change the case after jurisdiction has been thus acquired, and put the party on trial for a different crime, wholly unknown to the proceeding, upon evidence entirely different in its relations and in what it proves, and in respect to which the surrendering Government has never judged whether it did or did not make out a *prima facie* case, is manifestly to violate the rule in regard to evidence which is an express part of the stipulation.

Suppose the crime charged to be murder, that the accused was surrendered upon evidence relating to that crime, that being tried on this charge he was acquitted, and that he was then tried and convicted on the charge of forgery. The evidence upon which he was demanded and delivered referred to murder, and on this the delivering Government passed judgment; but the evidence upon which he was convicted referred to forgery, and on this the delivering Government passed no judgment. The right, however, of such preliminary judgment, as to the question whether the criminality is shown by sufficient evidence, is one of the express provisions of the treaty. Can that right be violated without violating the treaty?

Crimes so differ in the acts which constitute them that they are not all provable by the same evidence. The felonious killing of a human being is essentially different from the crime of forgery, and hence the evidence that may be sufficient to prove the one is not at all relevant as proof of the other. If the crime charged, and for which a delivery is made, be forgery, then the evidence, whether consisting in "depositions, warrants, or other papers," or in the oral testimony of witnesses, or in both, must show the necessary facts in respect to forgery; and, this being done, the Government asked to make the delivery is bound by express stipulation to withdraw from the accused the right of

asylum, and hand him over to the custody of the demanding Government, for the purpose specified, and on the basis of the facts, shown by the evidence. The surrender, if made, is made for that purpose, and for no other, and upon the evidence offered and considered sufficient to make out a *prima facie* case of forgery, and upon no other evidence.

Unless, then, we adopt the absurd proposition that the same evidence which proved the forgery is equally pertinent to prove a case of murder, or some other crime in its facts essentially different from forgery, the jurisdiction acquired by the delivery is, by the very terms of the rule in respect to evidence, necessarily limited to the crime for which the delivery was made. If not so limited by the receiving Government, then one of the fundamental stipulations of the treaty is ignored and treated as a nullity.

The surrendering Government, in every such case, would have no opportunity to pass judgment upon the evidence with reference to the question of its duty to make a surrender of the party for the crime for which he was tried. It would, as to the purpose for which it did make the surrender, be cheated by what would be equivalent to an act of bad faith; and whether the cheat was deliberately planned, or was simply an after-thought, would make no difference with the fact itself. In either event the purpose for which the delivering Government, under the stipulations and obligations of a treaty, granted the custody, and which was avowed by the demanding Government in making the requisition, would not be the one for which the custody would be used.

(5.) *The Right of Asylum.* — The manifest intention of these general stipulations is to maintain the right of asylum and exclude the extradition remedy in respect to all cases not enumerated, and not considered in the proceedings. In no other way can this end be gained. If Governments, upon receiving from each other fugitives from justice, may in their discretion exceed the limit thus established when they come to deal with these fugitives, then they may exceed it to any extent.

The provision or implication that there shall be no extradition for political offenses becomes a nullity if the demanding Government, having obtained the custody of the fugitive, chooses to

treat it as such. All the barriers against a perversion and abuse of the remedy are swept away. The specification of extradition crimes, the charge of a particular crime as the ground of the demand, and the rule of evidence in regard to that crime, impose no restraint whatever upon the jurisdiction when once acquired.

No nation, having any respect for itself, especially one that, like the United States, recognizes the *prima facie* right of unmolested asylum in respect to all persons coming under its jurisdiction, and committing no offense against its laws, would, with this construction, consent to make an extradition treaty with any other nation. Let this construction prevail, and that, so far at least as the United States are concerned, would speedily be the end of all such treaties.

(6.) *Crimes Enumerated but not Charged.* — The question has been raised whether the extradited party, though not triable for any offense antedating his surrender, but not enumerated in the treaty, may not be tried for any one of the offenses enumerated, whether it was or was not brought under consideration in the extradition proceedings. This question, unless there be an express provision otherwise, must be answered in the negative. The demanding Government, in order to procure extradition at all, must charge a particular offense within the extradition list, and then it must prove that charge to the satisfaction of the other Government. Upon this basis, the delivery, supposing it to be made, will be made, not for any offense within the treaty enumeration, but only upon the charge and proof of a particular offense within that enumeration.

All other offenses in the list are simply extraditable upon proper proceedings; but this only is the one for which the party was actually extradited. It is the only one charged, the only one considered by the delivering Government, and the only one in respect to which, in view of the evidence, it made the delivery. The extradition, as an actual process, had nothing to do with the other offenses named in the extradition list, any more than if they had not been so named. It related exclusively to the offense charged and deemed to be sufficiently proved; and the necessity of charging and proving that particular offense, as the condition of obtaining the custody demanded and sought, limits the right of



trial thereto, without any reference to other offenses which are also extraditable upon being properly charged and proved. By the terms of both the treaty and the process of the extradition no custody was granted in respect to these other offenses.

(7.) *Crimes after Extradition.* — The fact, moreover, that the extradited party is not by these general stipulations protected against trial for any offenses which he may commit against the receiving Government subsequently to his extradition, and while in its custody, or after his discharge therefrom, has no relation to the question whether he is thus protected in respect to offenses preceding his extradition, other than the one which was the ground of his surrender. The two cases are not parallel.

As to all crimes committed against the demanding Government prior to his extradition, the surrendered fugitive had the right of asylum within the territory of the Government asked to make the delivery; and the latter withdrew from him the right only in reference to the crime for which it surrendered him to the former, without any protection in regard to offenses which he might commit while in its custody, and after his extradition. As to such offenses, if committed, he never had an asylum within the jurisdiction of the delivering Government.

There is, hence, a broad distinction, in their relation to the two Governments, between crimes committed after and those committed before delivery. Extradition implies no immunity in respect to any of the former, since it has no relation to them; but in respect to the latter it is delivery for the specific crime charged and proved, and hence, the custody secured by it can be properly used only for the trial and punishment of that crime.

(8.) *The Conclusion.* — The conclusion derivable from this examination of the general provisions of the extradition treaties of the United States, is that these provisions imply a limitation of the extradition remedy, in its judicial and penal sequel, to the specific crime or crimes for which it was invoked, and in respect to which the delivering Government made the surrender. What is thus implied is as obligatory as if it had been formally and positively stated.

**6. Legislative Construction.** — A very strong confirmation is given to this view by the law enacted by the British Parliament, immediately after the negotiation of the treaty of 1842, for the purpose of carrying it into effect, and also by the law of Congress enacted in 1848, and applicable to all the extradition treaties of the United States.

The third section of the English law provided for the surrender of the person charged with crime within the limits of the treaty, after certain preliminary proceedings had been taken, "to such person or persons as shall be authorized in the name of the United States to receive the person so committed, and to convey such person to the territories of the United States, *to be tried for the crime of which such person shall be so accused.*" This reference to the crime for which the person was to be tried not only has its basis in the express provisions of the treaty, but like the treaty itself, is clearly an implied negative as to trial for any other crime. According to the construction claimed by Secretary Fish in the Winslow controversy, the words "or any *other* crime of which such person may be accused," should have been added. These words would express his understanding of the treaty; yet the understanding of the British Parliament, as shown by the wording of the law, was that the trial secured by the delivery was to be *only* for the offense of which the person had been "so accused."

The phrase "so accused" refers to the proceedings by which the fact of accusation in respect to a particular crime had been ascertained: and it was for this offense, and not for some other offense of which the party had not been "so accused," that he was to be delivered up to be tried.

The Congress of the United States in the law of 1848 expressed the same understanding of the treaty. (9 U. S. Stat. at Large, 302.) The third section of that law provided that, after the proceedings named in the first section had been completed, it shall be lawful for the Secretary of State "to order the person so committed to be delivered up to such person or persons as shall be authorized, in the name and on behalf of such foreign Government, *to be tried for the crime of which such person shall be so accused.*" The words in italics correspond exactly with those of the English law, and differ only in being meant to apply to all

the extradition treaties of the United States. They go upon the supposition, provided for in all these treaties, that the person to be delivered up has been accused of a specific crime, and his surrender, after the necessary preliminary proceedings, is directed to be made that he may be tried upon that accusation.

Nothing can be more foreign to the plain meaning of the language than the idea that the person, thus delivered up on a specific accusation that had been judicially considered as to its *prima facie* character, may, being delivered up, then be tried on another and wholly different accusation, and that, too, whether he is first tried for the offense charged, and then tried for another not charged, or tried only for the latter. Congress did not contemplate, as among the legal possibilities of the case, that the party delivered up could be tried for any other offense than the one of which he had been "so accused."

. This particular question had not then become a subject of controversy, any more than it is now a matter of controversy whether a man shall be tried on the indictment regularly found against him, or upon some other charge trumped up for the occasion; and, hence, it was enough for Congress, as it was for the British Parliament, to specify the crime of which the party "shall be so accused." No other crime was contemplated by the law and no other contemplated by the treaty.

The addition to the law made by Congress in the act of March 3, 1869 (15 U. S. Stat. at Large, 337), and reproduced in section 5275 of the Revised Statutes of the United States, provides that, in respect to any person delivered up and "brought within the United States" for the purpose of being "tried for any crime of which he is *duly accused*", the President shall have power to take all necessary measures for the transportation and safe-keeping of *such accused* person, and for his security against lawless violence, until the final conclusion of his trial for the *crimes or offenses specified in the warrant of extradition*, and until his final discharge from custody or imprisonment for or on account of *such crimes or offenses*, and for a reasonable time thereafter."

The words in italics show that Congress, when passing this law, had not the remotest idea of any other crimes for which the party might be tried than those "specified in the warrant of extradition;" and in this respect the Congress of 1869 had precisely the view held by the Congress of 1848.

**7. The Extradition Warrant.**— We give, as follows, a specimen of an extradition warrant made out by the Secretary of State under the authority of law :

“ Now, therefore, pursuant to the provisions of section 5272 of the Revised Statutes of the United States, these presents are to require the United States Marshal for the Eastern District of New York, or any other public officer or person having charge or custody of the aforesaid James Bowen, *alias* William Miller, to surrender and deliver him up to Adam Bligh, a constable of the United Counties of Stormont, Dundas and Glengary, Canada, who has been authorized, in the name and on behalf of the British Government, by his Majesty's Minister at this capital to receive him, or to any other person or persons who may in like manner be authorized, in the name or on behalf of the said Government, to receive the said James Bowen, *alias* William Miller, *to be tried for the crime of which he is accused.*”

This extradition warrant was issued against James Bowen in execution of the treaty and the law to carry it into effect. It names the man to be delivered up, and just as distinctly points to the crime for which he is to be tried. That crime is the one mentioned in the previous recital, and which is here referred to as “ the crime of which he is accused.” To specify that crime and at the same time assume that he may also be tried for any other crime, is to make the specification utterly meaningless, except to grant a jurisdiction of which it does not give the slightest hint. The assumption changes the character of the extradition warrant.

**8. President Tyler's Explanation.**— President Tyler when communicating the treaty of 1842 with Great Britain to the Senate, accompanied it with an explanatory paper prepared by Daniel Webster, in which the President thus refers to the extradition article of the treaty :

“ The article on the subject in the proposed treaty is carefully confined to such offenses as all mankind agree to regard as heinous and destructive of the security of life and property. In this careful and specific enumeration of crimes the object has been to exclude all political offenses or criminal charges arising from wars or intestine commotions. Treason, misprision of treason, libels,

desertion from military service and other offenses of similar character are excluded." (Webster's works, vol. 6, p. 355.)

How are these offenses, not meant to be included, excluded? Certainly not expressly, but by obvious implication; and this implication arises from the fact that they are not placed in the extradition list. Yet this exclusion is the merest farce, if it be true that either Government, having obtained possession of the fugitive on the charge of some one of the crimes named, may proceed to try him for any one of these other offenses not named, or for any offense other than the one charged as the basis of the demand and specified in the warrant of delivery.

The moment the demanding and receiving Government, in the exercise of its penal jurisdiction, passes the limit fixed by the enumeration of extradition offenses, and fixed by its own charge of a specific offense or offenses within the enumeration as the ground of the demand, and fixed by the surrender, it passes all limits, and may try and punish for just what it pleases, without any reference to the circumstances under which it acquired the power to try and punish at all. A single step in this direction completely sweeps away all the security which Mr. Webster supposed to have been gained by a careful enumeration of the offenses for which extradition might be claimed.

We have, then, the authority of writers on the subject of extradition, the authority of the extradition treaties of the United States, and the authority of the laws of the United States for the execution of these treaties, all uniting in the general proposition of an implied obligation to confine extradition to the specific purpose for which it was sought by one Government, and granted by the other. This implication rests not only upon the reason of the thing, but upon the treaties themselves, and is in fact a part of these treaties.

**9. Special Provisions in Particular Treaties.** — But it may be said that this conclusion, derived from the general provisions common to all these treaties, is, in some of them, modified and either partially or wholly set aside by special provisions. This raises the question whether there are any such provisions in any of these treaties, and to what extent, if at all, they have the

effect attributed to them. The treaties themselves must supply the answer. What then are the facts?

(1.) *Citizens.* — Twenty of these treaties, besides their general stipulations as to delivery for specified crimes, and as to the charge and proof of some one or more of these crimes, specially provide that neither of the contracting parties shall be required to deliver up its own citizens, no matter whether they have or have not committed any of the crimes specified. This provision, however, has no relation to the question whether a person, surrendered upon the charge and proof of an extradition crime, can thereafter be tried for some other crime preceding his extradition, and not included in the proceedings which secured the custody. It simply relates to the question of citizenship, and not to the crime for which it is allowable to try a surrendered party, and hence does not modify the implication on this subject arising from the general stipulations of these treaties.

(2.) *Political Offenses.* — There is also a special provision in twenty of these treaties that they shall have no application to what are called political offenses; yet this has no relation to the question whether an extradited party may or may not be tried for an offense other than the one for which he was surrendered. It simply excludes political offenders from the class of persons who may be extradited; and in this respect it expressly declares what the omission, in some of the extradition treaties of the United States, to name political offenders as extraditable, necessarily implies.

(3.) *Date of Crimes.* — The extradition treaty of 1843 between the United States and France specially provides, that it "shall not be applied in any manner to the crimes enumerated in the second article committed anterior to the date thereof." A similar provision is found in the extradition treaties of the United States with Austria, the Dominican Republic, Hayti, Orange Free State, the Swiss Confederation, and Venezuela. In the treaties with Mexico, Peru and Spain, there is a provision that they shall have no application to offenses committed anterior to the exchange of ratifications.

The whole effect of these provisions is to exclude the crimes specified in the extradition lists if committed prior to the dates named, and confine the operation of the treaties to such crimes only as, being specified, may be committed subsequently to these dates. This has nothing to do with the question whether a party, being delivered up for an extradition crime not excluded by the date of its commission, may, under the custody thus obtained, be put on trial for a different offense antedating the treaty.

The treaty with Ecuador specially provides that the person or persons delivered up, on the charge and proof of one or more of the crimes specified therein, "shall not be prosecuted for any crime committed previously to that for which his or their extradition may be asked." This provision expressly declares a part of what is implied in the general stipulations of this and all the other extradition treaties of the United States. These general stipulations, as we have endeavored to show, by implication, confine the custody granted to the purpose for which it was granted; and the special provision in this treaty expressly asserts so much of this doctrine as relates to crimes "committed previously to that for which" the extradition may have been asked. It does not assert the whole of the doctrine, but only a part of it. The contracting parties, for reasons which they have not explained, saw fit to place in express words a part of the implication arising from the general provisions of these treaties.

This is not uncommon in the extradition treaties of the United States. It is universally admitted that none of these treaties either expressly or by implication, provide any extradition for political offenses. Such offenses are not enumerated among extradition crimes; and yet twenty of these treaties expressly declare, what is implied in all of them, that there shall be no extradition for offenses of a political character. So the treaty with Ecuador expressly declares, what is implied in its general provisions, that there shall be no trial for any offense antedating the one for which the surrender is asked. This point is not left to implication or construction, but made a matter of express statement. And as to the question whether there may be a trial for a crime committed subsequently to the one for which the surrender is asked, and antecedently to the surrender, the special provision neither affirms nor denies.

The extradition treaty of the United States with the King of Italy expressly declares that "the person or persons delivered up for the offenses enumerated in the preceding article shall in no case be tried for any *ordinary* crime, committed previously to that for which his or their surrender is asked." A similar provision occurs in the treaties with Nicaragua, the Ottoman Empire, and Salvador. The provision is identical with that contained in the treaty with Ecuador, with the exception of the distinction made by inserting the word "ordinary," as characterizing the crime for which there shall be no trial, if committed before the one for which the surrender was asked. Such a crime is expressly excluded from trial; and it is by implication equally excluded in those general provisions of these treaties which enumerate extradition crimes, and relate to the necessity of charging and proving some one or more of these crimes, in order actually to procure the extradition of a fugitive criminal. What is expressly stated in the special provision, and what is implied in the general provisions, are not contradictory, but so far concurrent. What the latter imply the former explicitly asserts.

But it may be said that the implication from this special provision is, that there may be a trial for any crime committed before the one for which the surrender is asked, if it be not an "ordinary crime" in the sense of these treaties. Let this, for the sake of the argument, be granted; and then the result would be that we have in these treaties contradictory implications.

One of the implications, arising from their general stipulations, asserts that there can be no trial for any crime, whether "ordinary" or not ordinary, committed prior to the extradition, other than the one which was the subject-matter of the proceedings. The other implication asserts that any crime which is not "ordinary," being committed by the person delivered up, antecedently to the one for which his surrender was asked, may be thus tried. This is a manifest contradiction of implications; and if we admit both implications as real, then the treaties themselves are self-contradictory.

Should a case arise, involving the question, it would be necessary to decide between the implications, and determine which expressess the real intent of the contracting parties. The phrase



"any ordinary crime" opens a wide field for disputation as to its construction.

(4.) *Postponement of Surrender.* — A large number of the extradition treaties of the United States specially provide that, where a party demanded has committed an offense against the Government on which the demand is made, and is in legal custody therefor, his extradition may be deferred until after his acquittal or the expiration of his punishment. This plainly has nothing to do with the question under consideration.

(5.) *The Treaty with Spain.* — The treaty with Spain, concluded January 5th, 1877, which was after the *Winslow* controversy, expressly declares that "no person shall be tried for any crime or offense other than that for which he was surrendered, unless such crime be one of those enumerated in article second, and shall have been committed subsequent to the exchange of the ratifications hereof." This provision agrees with the implication, growing out of the general stipulations of all the extradition treaties of the United States, including that with Spain, in excluding from trial all offenses not specified in the enumeration, and different from the one for which the party was surrendered. For these offenses there can be no trial.

The provision, however, disagrees with this implication, and so far reverses it in the operation of this treaty, in expressly affirming that if the offense, though different from the one for which the party was surrendered, be one of the crimes enumerated in article second of the treaty, and shall have been committed subsequently to the exchange of ratifications, then, but not otherwise, the extradited party may be put on trial therefor.

Both of the conditions must be present in order to a trial for an offense other than the one for which the surrender was made; and when they are present, then the general implication as to trial is set aside, and the express special provision prevails.

A similar special provision is contained in the treaty of May 22, 1880, with the Netherlands.

(6.) *The Treaty with Belgium.* — The third article of the treaty of June 13, 1882, with Belgium, provides as follows:

"A person surrendered under this convention shall not be tried or punished in the country to which his extradition has been granted, nor given up to a third power for a crime or offense not provided for by the present convention and committed previously to his extradition, until he shall have been allowed one month to leave the country after having been discharged; and if he shall have been tried and condemned to punishment he shall be allowed one month after having suffered his penalty or having been pardoned."

"He shall moreover not be tried or punished for any crime or offense provided for by this convention committed previous to his extradition, other than that which gave rise to the extradition, without the consent of the Government which surrendered him, which may, if it think proper, require the production of one of the documents mentioned in article seven of this convention."

"The consent of that Government shall likewise be required for the extradition of the accused to a third country; nevertheless such consent shall not be necessary when the accused shall have asked of his own accord to be tried or to undergo his punishment, or when he shall not have left within the space of time above specified the territory of the country, to which he has been surrendered."

**10. The Conclusion.** — The result reached by this examination of the general and special provisions of the extradition treaties of the United States is, that the implication arising from their general provisions against trial for any offense, committed prior to extradition, other than that for which the party was surrendered, remains good as a part of the treaties, with the following qualifications relating to particular treaties:

(1.) That a party, extradited under the treaty with Spain, may be tried for an offense other than that for which he was surrendered, provided that the offense be one of the extradition crimes enumerated in the treaty, and provided also that it was committed subsequently to the exchange of the ratifications of the treaty. These two conditions being present, then the offender may be tried for the crime, though it is not the one for which he was surrendered; and so far the implication from the general stipulations of this treaty is modified.

(2.) That a party, extradited under the treaty with Belgium may, with the consent of the Government that surrendered him, be tried for an offense other than that which gave rise to the ex-

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tradition, if the offense be one of those provided for in the treaty and was committed previously to his extradition. The treaty makes this special provision, and so far modifies the implication of its general provisions.

(3.) That the party, extradited under the treaties with Italy, Nicaragua, the Ottoman Empire, and Salvador, respectively, cannot be tried for "any *ordinary* crime committed previously to that for which his surrender is asked," leaving the question open, so far as the express language of the provision is concerned, whether he may be tried for a crime committed previously to the one for which his surrender is asked, provided that it is not an "ordinary crime."

The general implication common to all the extradition treaties of the United States, and arising from stipulations which are also common to them all, is that the jurisdiction gained by extradition, and to be exercised over the party extradited, is not *general* in its character, and hence not operative in respect to any crimes that may have been committed prior to the extradition, and which were not the subjects of the extradition proceedings on the part of either Government, but *special* and limited in its scope, and hence that the custody of the accused party thus gained must in its use be confined to the purpose for which it was gained, unless there be a particular stipulation in a treaty or treaties that, in respect to cases arising under the same, enlarges the scope of this jurisdiction, so that it may act upon a crime or crimes, committed prior to the extradition, other than the one for which the extradition was asked on the one hand and granted on the other.

This general implication, in the absence of any particular stipulation modifying it, is a fundamental part of every extradition treaty of the United States, and is binding upon the contracting parties, as really as if it were stated in express words. It results as a necessary inference from the general terms of these treaties when the same are not otherwise qualified.

## CHAPTER VII.

## LEGAL OPERATION OF EXTRADITION TREATIES.

**1. Treaties as Contracts.**—“A treaty,” said Chief Justice Marshall, in *Foster v. Neilson*, 2 Pet. 253, 314, “is, in its nature, a contract between two nations, not a legislative act. It does not generally effect, of itself, the objects to be accomplished, especially so far as its operation is infra-territorial, but is carried into execution by the sovereign power of the respective parties to the instrument.”

This defines a treaty, considered simply as a contract between two independent Governments; and generally, it is nothing more, whatever may be the subject matter involved therein.

The contracting parties are Governments, acting for the political communities they respectively represent; and, as such, they bind themselves to do or not to do the things specified in the treaty. The treaty creates between them an obligation of good faith, and operates directly upon them as the rule by which, in the matters stated, they have agreed to regulate their conduct toward each other.

Regarded simply as a contract between Governments, a treaty, in application to individual persons, has no legislative character whatever; and, as to its construction and execution, it is the subject of executive and diplomatic rather than judicial consideration.

These general statements hold as true of treaties for the extradition of fugitive criminals as they do of treaties on any other subject. Such treaties specify the cases in which, and the terms upon which, the contracting Governments will deliver to each other fugitive criminals, and differ from other treaties only in the subject-matter to which they relate. They, consequently, bind the faith of these Governments, and furnish the rule by which their conduct, on this subject, is to be governed. The sovereign authority of each Government is pledged to supply the requisite machinery, in the way of law and agencies for its execution, to carry the stipulations of the treaty into effect; and any failure

or refusal to do so, on the part of either Government, would be a violation of the treaty, and a just cause of remonstrance and complaint.

**2. Treaties as Laws.**—The Constitution of the United States, while not ignoring or setting aside the international obligation created by treaties, or in any respect changing them as contracts, adds to them the character of supreme municipal *laws* within the territory and among the people of the United States. The sixth article of this Constitution provides as follows:

“This Constitution, and the laws of the United States which shall be made in pursuance thereof, and all treaties made, or which shall be made under the authority of the United States, shall be the supreme law of the land; and the judges in every State shall be bound thereby, any thing in the constitution or laws of any State to the contrary notwithstanding.”

A treaty of the United States is hence, for the people of the United States, and within the territory thereof, more than a contract with a foreign Government. It is also a part of “the supreme law of the land,” and, in this respect, stands on the same footing as an act of Congress. The President, when, with the advice and consent of the Senate, entering into a contract with a foreign Government, at the same time enacts, in legal effect, a supreme municipal law. This peculiarity of treaties of the United States results from an express provision of the Constitution.

It is to be remembered, however, that these treaties have the character and effect of laws only in their internal operation upon and among the people of the United States. They are laws in this “land,” and not elsewhere. The moment we pass outside of this local sphere, and view them in their purely international relation, they are simply contracts between the two Governments.

The Constitution authorizes Congress “to make all laws which shall be necessary and proper for carrying into execution” the express powers granted to Congress, and “all other powers vested in the Government of the United States, or in any department or officer thereof.” The treaty-power vested in the President, subject in its exercise to the advice and consent of the

Senate, is one of these "other powers;" and there can be no doubt as to the authority of Congress to legislate for the execution of all the treaties which the President may see fit to make. Indeed, many of the treaties which the President has made could not have been carried into effect, without the appropriate legislation on the part of Congress.

Extradition treaties then, like treaties on any other subject, have in the United States the character and effect of supreme municipal laws, and, as such, operate among the people of the United States. They are not excepted from the general principle of the Constitution which gives this character to all the treaties of the United States. When the President makes such a treaty he enacts a law, and that law, like any other law, becomes a rule of conduct.

**3. Cases under Treaties.** — The third article of the Constitution declares that the judicial power of the United States "shall extend to all cases in law and equity arising under this Constitution, the laws of the United States, and treaties made, or which shall be made, under their authority." A case, if arising under a treaty of the United States, is hence as proper a subject for judicial consideration and determination as it would be if it had arisen under an act of Congress, or under the Constitution itself.

A case in law or equity arises under such a treaty whenever that treaty gives or secures the right, privilege, or immunity claimed by a party before a court, or whenever a correct decision in respect to such right, privilege, or immunity depends upon the construction of the treaty. This is the rule in regard to cases arising under the laws of the United States; and the same rule applies equally to treaties considered as laws. (*Osborn v. The United States Bank*, 9 Wheat. 738, 819; *Cohens v. Virginia*, 6 id. 264, 379; *Tennessee v. Davis*, 10 Otto, 257, 264; *The Railroad Co. v. Mississippi*, 12 id. 135; *Owings v. Norwood's Lessee*, 5 Cranch, 344; *Henderson v. Tennessee*, 10 How. 311; *Gill v. Oliver's Executors*, 11 id. 529; and *Verden v. Coleman*, 1 Black. 472.)

The supreme law of the land gives to every party, when plead-

ing before a court, whether State or Federal, the right to claim the rights, privileges, or immunities secured to him by a treaty of the United States; and no court can properly refuse to hear such a plea, or to determine the question which it raises. The fact that the treaty is a contract between two Governments, and as between them involves an international obligation, does not in the slightest degree affect its character as a law, or the right claimed under it. It is also a law for the court, as well as a contract for the Government; and while it binds the faith of the latter, it is an imperative rule for the former.

The special character of the right claimed, or of the treaty under which the claim is made, is a matter of no consequence. It is enough that a right is claimed under a treaty; and the question whether the claim is valid or not is judicial in its nature. The fact that the treaty is one for extradition, and that the party claiming a right, privilege, or immunity under it is alleged to be a fugitive criminal, makes no difference with the legitimacy of the claim or the application of the treaty thereto. A case in law or equity arising under an extradition treaty has all the legal properties of a case in law or equity arising under any other treaty of the United States, and is to be disposed of accordingly.

**4. Judicial Notice of Treaties.** — The treaties of the United States, whether for extradition or other purposes, having the character of public laws, are, like the acts of Congress, to be taken notice of by courts. Mr. Justice Story, in *Martin v. Hunter's Lessee*, 1 Wheat. 304, referring to a treaty of the United States, said that it "was not necessary to have been stated, for it was the supreme law of the land, of which all courts must take notice."

Section 908 of the Revised Statutes of the United States declares that "the edition of the laws and treaties of the United States, published by Little & Brown, shall be competent evidence of the several public and private acts of Congress, and of the several treaties therein contained, in all the courts of law and equity and of maritime jurisdiction, and in all the tribunals and public offices of the United States, and of the several States, without any further proof or authentication thereof."

These treaties, in the original copies, are preserved in the archives of the Government, and are published under its authority as rules for courts of justice, and that, too, whether they are specially reminded of them or not in the pleadings. It is their business to understand and judicially notice this branch of the law. Extradition treaties stand, in this respect, on the same basis as that of other treaties, having the same attributes as international contracts and the same character as laws and rules for courts.

**5. Date of legal Operation.** — The general rule is that treaties, viewed simply as contracts, unless they otherwise stipulate, take effect at and from the date of their signature by the contracting parties. Regarded, however, as laws, affecting the rights of private parties, they do not become operative until ratified and officially proclaimed by the President.

The first of these propositions was affirmed by the Supreme Court of the United States in *Davis v. The Police Jury of Concordia*, 9 How. 280; and both were affirmed by the same court in *The United States v. Arredondo*, 6 Pet. 691.

Mr. Justice Davis, in *Haver v. Yaker*, 9 Wall. 32, spoke as follows on this point :

“It is undoubtedly true, as a principle of international law, that, as respects the rights of either Government under it, a treaty is considered as concluded and binding from the date of its signature. In this regard the exchange of ratifications has a retro-active effect, confirming the treaty from its date. But a different rule prevails when a treaty operates on individual rights. \* \* \* As the individual citizen on whose rights it operates has no means of knowing any thing of it while before the Senate, it would be wrong in principle to hold him bound by it, as the law of the land, until it was ratified and proclaimed. And to construe the law, so as to make the ratification of the treaty relate back to its signing, thereby divesting a title already vested, would be manifestly unjust, and cannot be sanctioned.”

This fixes the date at which a treaty of the United States becomes operative as a law, unless it otherwise provides. Courts can take no judicial notice of a treaty until it has assumed a public form; and this does not occur until, being duly ratified, it is



formally proclaimed by the President. Then it is a law in relation to rights affected by it, and in relation to courts whose duty it may be to apply any of its provisions.

**6. Construction of Treaties.**— The construction and execution of the treaties of the United States, regarded simply as contracts with foreign Governments, belong to the political department of the Government, which includes the President and the two Houses of Congress. It is their business to see to it that such contracts are duly executed in good faith. Congress supplies the requisite legislation, and the President carries it into effect.

When, however, these treaties operate as laws, and, as such, affect the rights of a party or parties before a court of justice, then their construction is purely a judicial function. Mr. Justice Grier, in *Wilson v. Wall*, 6 Wall. 83, said: "Congress has no constitutional power to settle the rights under treaties, except in cases purely political. The construction of them is the peculiar province of the judiciary when a case shall arise between individuals."

Chief Justice Johnson, in delivering the opinion of the Supreme Court of Ohio in *The State v. Vanderpool et al.*, 4 Ohio Law Journal, 187, 188, having referred to the provision of the Constitution of the United States in regard to treaties, proceeded to say:

"This treaty is, therefore, the law of the land, and the judges of every State are as much bound thereby as they are by the Constitution and laws of the Federal and State Government. It is, therefore, the imperative duty of the judicial tribunals of Ohio to take cognizance of the rights of persons arising under a treaty to the same extent as if they arose under a statute of the State itself."

The question considered and determined in this case was whether a person, who, upon the charge and proof of a specific crime, had been extradited to the United States under the tenth article of the treaty of 1842 with Great Britain, could, in this country, be detained in custody and prosecuted for a different crime than the one that was the subject of the extradition proceedings. The answer to this question, as the court held, depended

upon the construction of the treaty; and hence it construed the treaty as a law. The question on this basis was answered in the negative.

**7. Treaties Self-executing and those not Self-executing.** — Chief Justice Marshall, in *Foster v. Neilson*, 2 Pet. 253, 314, referred to the fact that the "Constitution declares a treaty to be the law of the land," and then proceeded to say:

"It is, consequently, to be regarded in courts of justice as equivalent to an act of the legislature, whenever it operates of itself without the aid of any legislative provision. But when the terms of the stipulation import a contract, when either of the parties engages to perform a particular act, the treaty addresses itself to the political, not the judicial department; and the legislature must execute the contract before it can become a rule for the court."

The same doctrine was stated by Mr. Justice McLean in *Turner v. The American Baptist Missionary Union*, 5 McLean, 344.

If the treaty, by its own terms, be an *executed* contract, acting directly on the subject-matter and settling the same, then it is a law of the land without any legislation by Congress to carry it into effect. This feature makes it self-executing in the sense that it does not need legislation to render it operative as a law. It takes effect and operates as a law from the date of its proclamation.

If, however, the treaty be simply an *executory* contract, pledging the faith of the United States to do certain things *in futuro*, the doing of which requires the legislation of Congress, then it is not a law of the land for the purposes of judicial administration until the necessary legislation shall have been supplied by Congress. In the one case the treaty is self-executing, and in the other it is not so.

The extradition treaties of the United States are evidently not self-executing, at least in their general provisions. They are executory rather than executed contracts. They pledge the faith of the Government to do certain things, in the presence of specified conditions; and, in order to give effect to them, Congress, while not changing their terms in any respect, must legislate for

their execution, providing thereby for the method of arresting and delivering up fugitive criminals.

This is precisely what Congress did by the Act of August 12, 1848. (9 U. S. Stat. at Large, 302.) The act was designed to operate as a general law for the execution of all the extradition treaties of the United States. This act was supplemented and modified in one of its sections by the Act of June 22d, 1860. (12 U. S. Stat. at Large, 84.) Sections 5270-5277 of the Revised Statutes of the United States are a reproduction of the legislation contained in these two acts. Congress by the Act of June 19th, 1876 (19 U. S. Stat. at Large, 59), and by the Act of August 3d, 1882 (22 U. S. Stat. at Large, 215), legislated still further on the subject. The result is a body of laws for the execution of the extradition treaties of the United States.

All of these treaties, though not self-executing, having been supplemented by the necessary legislation for their execution, are then, in all their provisions, a part of "the supreme law of the land," and, as such, binding upon courts, whether State or Federal, in respect to the determination of cases arising under them.

**8. Conflict of Treaties and Laws.** — It is a settled doctrine that the treaties of the United States, being a part of the "supreme law of the land," abrogate and render null and void all provisions in State constitutions or State laws that are in conflict with them. To secure this result was the main, if not the sole, reason for making treaties supreme municipal laws, and extending the judicial power of the United States to cases arising under treaties.

The great question considered and determined by the Supreme Court of the United States, in *Ware v. Hylton*, 3 Dall. 199, was whether the treaty of peace made with Great Britain in 1783, rendered inoperative the law of Virginia enacted in 1777, confiscating debts due from citizens of that State to British subjects, and discharging the former from all liability of payment to the latter. The treaty expressly declared that "creditors on either side shall meet with no lawful impediment to the recovery of the full value, in sterling money, of all *bona fide* debts heretofore contracted." (8 U. S. Stat. at Large, 80, 82.) The court held

that this provision applied to the debts which had been confiscated by the legislature of Virginia, and that, being inconsistent with that act, it rendered the act null and void.

This early decision as to the paramount authority of the treaties of the United States, when in conflict with State constitutions and State laws, has become the settled doctrine of American courts. (*Owings v. Norwood's Lessee*, 5 Cranch, 344; *Fairfax's Devisee v. Hunter's Lessee*, 7 Cranch, 603; *Worcester v. The State of Georgia*, 6 Pet. 515; *Gordon's Lessee v. Halliday*, 1 Wash. 291; and *Fisher v. Harden*, 1 Paine, 55.)

The Constitution admits of no doubt on this subject. It is the duty of all State judges to regard the treaties of the United States as supreme laws, and the same duty is imposed upon the Federal judiciary. If the former fail to do so there is a remedy, by a proper proceeding, for the failure in the powers of the latter. Extradition treaties are no exception to this general principle. A proceeding under a State law, which is inconsistent with an extradition treaty of the United States applicable to the case, is for that reason without authority of law.

If, however, a conflict exists between a treaty of the United States and a law enacted by Congress, and the question arises in a suit pending before a court, then either the treaty or the law will be the rule for the court accordingly as it is the *last* expression of authority on the subject to which both apply. Both being an exercise of sovereign authority, and both having the same rank as laws, either may repeal the other considered as a law to guide and control the action of a court, provided it be the *last* expression of this authority. The question of time will determine in such a case whether the treaty will repeal the law, or the law will repeal the treaty. (*The United States v. The Schooner Peggy*, 1 Cranch, 103; *The Cherokee Tobacco Case*, 11 Wall. 616; *Ropes et al. v. Clinch*, 8 Blatch. 304; *Taylor et al. v. Morton*, 2 Curtis, 454.)

**9. Protection by Habeas Corpus.** — A person, under the stipulations of a treaty, demanded of a foreign Government and by that Government surrendered to the United States, as a fugitive criminal, may be so demanded and surrendered on a charge of crime against the United States, or on a charge of crime against

some one of the States of the Union. The extradition treaties cover both classes of cases. They make no distinction between offenses against Federal law and those against State law. The action of the Government in procuring the surrender of the fugitive criminal is precisely the same in both cases.

In the one case, however, the Government of the United States, through its prosecuting officer and its judicial agency, deals with the criminal whose custody has been thus obtained. The party extradited remains in its hands for trial and punishment; and with the case State authority has nothing to do.

In the other case, the offense charged being committed solely against State laws, the General Government, having by extradition obtained the custody of the offender, hands him over to the proper State authority for trial and punishment; and the latter, in such trial and punishment, acts independently of the former. If the State authority should use the custody in a way and for purposes inconsistent with the treaty under which it was acquired, and thus in fact violate the treaty, the General Government would, for such an abuse of power, be responsible to the foreign Government that made the surrender. It ought, therefore, to have some corrective remedy by which it could reach such a case. That would be a very anomalous and might be a very embarrassing and possibly a dangerous condition of things, if, after the General Government has caught the fugitive by demanding and receiving him, and has transferred him to State authority, the latter were permitted to treat as immaterial the treaty stipulations and the extradition proceedings which have placed him in its hands, and the former had no power to afford any remedy against violations of the treaty by State authority.

It is, for example, a well settled doctrine that political offenses are not proper causes for extradition; and in many of the treaties of the United States it is provided in express terms that these treaties shall have no application to political offenses. If a State, having by extradition obtained the custody of a fugitive criminal, should then use this custody for his trial and punishment for a political offense, this would be in violation of a fundamental doctrine in respect to extradition, if not of the express provision of the treaty under which the extradition was obtained.

So, also, many of the extradition treaties of the United States provide that neither Government shall be required to deliver to the other its own citizens or subjects. If a State having obtained the custody of a fugitive criminal, who as a matter of fact was a citizen or subject of the Government that by mistake on this point made the delivery, should proceed to try and punish that criminal, then this would be contrary to both the letter and intent of the treaty, provided it contained this qualification in respect to citizens or subjects. Or, if a State should try and punish the party for an offense, committed prior to his extradition, other than that for which the extradition was granted, then this would be in violation of the implication arising from the general provisions of the extradition treaties of the United States.

These suppositions suggest the question whether the General Government, having procured the extradition, and delivered the accused party to the authorities of the State against whose laws he is charged with having committed an offense, has any means of securing to him the protection to which he is entitled by the treaty under which the extradition was obtained. The first section of the Act of February 5, 1867 (14 U. S. Stat. at Large, 385), a part of which is reproduced in section 753 of the Revised Statutes of the United States, though not enacted for this special purpose, supplies an answer to this question.

The section provides "that the several courts of the United States, and the several justices and judges of such courts, within their respective jurisdictions, in addition to the authority already conferred by law, shall have power to grant writs of *habeas corpus* in all cases where any person may be restrained of his or her liberty in violation of the Constitution, or of any treaty or law of the United States." This act authorized an examination to be summarily had by *habeas corpus* in any such case; and if on the hearing, it appeared that the restraint of liberty was in violation of the Constitution, or a treaty, or law of the United States, the act directed the prisoner to be discharged. The same authority is continued in section 753 of the Revised Statutes of the United States, which was in part borrowed from this act.

The provision, here made, clearly covers the case in which the

authority exercised by a State over an extradited party, placed in its custody, is in conflict with a treaty of the United States. The party in these circumstances would be entitled to sue out a writ of *habeas corpus* from a Federal court; and if, upon an examination of the case, it appeared that the custody was maintained and exercised in violation of a treaty of the United States, then the custody would be unlawful, and it would be the duty of the court or judge to discharge the prisoner.

The General Government plainly ought to have some method by which it can secure to extradited parties, as against any abuses by State authority, all the rights guaranteed by treaty, whether expressly or by implication. It is the duty of that Government to see to it that the treaty is in no respect violated, either by its own authority or by State authority. Extradition is granted in response to its demand; and good faith requires that the use of the custody thereby gained should be kept strictly within the limits of the treaty under which it was gained. The Federal writ of *habeas corpus*, as defined by law, is an appropriate remedy to secure this result.

## CHAPTER VIII.

## THE CASE OF CALDWELL.

**1. The Seven Preceding Chapters.**—The purpose of the seven preceding chapters is to make a general statement on the subject of international extradition, as recognized and practiced in this country. The following are the points which have been presented :

(1.) That such extradition is based upon, regulated by, and confined to, treaties of the United States with foreign Governments for this purpose, defining the cases in which, and the terms upon which, it may be had.

(2.) That the individual States of the Union have, under the Constitution, no power to surrender fugitive criminals to foreign Governments.

(3.) That the treaty-power, as vested in the President of the United States, subject in its exercise to the advice and consent of the Senate, extends to the making of treaties for extradition.

(4.) That the President, in the exercise of this power, has made a series of treaties for extradition with foreign nations, which are still in force.

(5.) That Congress has enacted laws for carrying these treaties into effect.

(6.) That the general implication of these treaties confines the jurisdiction over the accused person, acquired by the process of extradition, to the purpose for which it was acquired, and, hence, that, in the absence of an express provision otherwise declaring, a party surrendered to the United States by a foreign Government, under a treaty for this purpose, cannot be held and prosecuted for any crime, committed prior to his extradition, other than that for which the extradition was granted, and that when the jurisdiction as to this crime has gained its end, in either his acquittal or punishment, he is entitled, if committing no offense subsequently to his extradition, to the privilege of departing from the United States without hindrance by any agency of law.



(7.) That the extradition treaties of the United States, while contracts in their relation to foreign Governments, possess, under the Constitution, in their operation upon and among the people of the United States, the attributes of supreme municipal laws, which, in cases arising under them, are to be construed and applied by courts of justice.

Such in brief is the outline of the subject-matter contained in the previous chapters.

The next field of investigation will be found in a series of extradition cases which have arisen and been determined by the courts of this country, especially with reference to the question whether a party, extradited to the United States, can be tried and punished for a crime, committed prior to his extradition, other than the one for which he was demanded on the one hand, and surrendered on the other. The first of these cases, to be considered, is that of *The United States v. Caldwell*, 8 Blatch. 131.

**2. The Facts of this Case.** — Richard B. Caldwell, who was a resident in the Dominion of Canada, was, in 1870, extradited therefrom on the charge of forgery, under the tenth article of the treaty of 1842 with Great Britain, which article specified forgery as one of the offenses for which extradition might be demanded by either party to the treaty. He was not tried for this offense at all, but was indicted, tried, convicted, and punished for bribing an officer of the United States. Bribery was not enumerated in the treaty as an extraditable offense.

The fact, then, in this case, is that the party was extradited for an offense for which he was not tried, and was tried and punished for an offense for which he was not and could not have been extradited. The jurisdiction over his person was not used for the purpose for which it was professedly gained, and was used for a purpose for which it was not and could not have been gained. Whether it was or was not the intention, at the time of seeking the extradition, to ask it for one purpose and use it for another and different purpose, the result was practically a fraud upon the authority that made the surrender.

This case, at the January term, 1871, of the Circuit Court of the United States for the Second Circuit, came before Judge

Benedict by whom the court was held. Caldwell, in pleading to the indictment for bribery, called the attention of the court to the fact that he had been extradited from the Dominion of Canada on the charge of forgery, which was one of the offenses enumerated in the treaty of 1842 with Great Britain, and claimed, under this treaty, an exemption from trial and punishment for any offense, committed prior to his extradition, other than the one charged in the extradition proceedings, and for which he had been delivered up by the Canadian authorities. He, in effect, denied the jurisdiction of the court to try him on the charge of bribery, it not being the charge on which he was extradited, and bribery not being under the treaty an extraditable offense.

The Government of the United States, through its District Attorney, interposed a demurrer to this plea, and, on this demurrer, the case came before the court. Judge Benedict sustained the demurrer, and holding the plea to be bad, gave the prisoner liberty to withdraw it, and enter the plea of not guilty. Caldwell was afterward tried, convicted, and punished for bribing an officer of the United States. Such are the facts in this case.

**3. The Deliverance of Judge Benedict.** — The following extract contains the substance of this deliverance in respect to the legal point set up by Caldwell :

“ I am of the opinion that the relief could not be granted, for the reason that the person of the prisoner is not within the jurisdiction of the United States by virtue of any warrant issued out of this or any court. The prisoner was brought within the jurisdiction of the United States by virtue of a warrant of the executive authority of a foreign Government, upon the requisition of the Executive Department of the Government of the United States; and, while abuse of extradition proceedings and a want of good faith in resorting to them doubtless constitutes a good cause of complaint between the two Governments, such complaints do not form a proper subject of investigation in the courts, however much these tribunals might regret that they should have been permitted to arise. \* \* \* But whether extradited in good faith or not, the prisoner, in point of fact, is within the jurisdiction of the court, charged with a crime therein committed; and I am at a loss even for a plausible reason for holding upon such a plea as the present, that the court is without jurisdiction to try him. \* \* \* And I cannot say that the fact that the defend-

ant was brought within the jurisdiction by virtue of a warrant of extradition for the crime of forgery affords him a legal exemption from prosecution for other crimes by him committed."

The doctrine, here stated, is that Caldwell, having been brought within the jurisdiction of the United States, not by virtue of a warrant issued by the court or that of any court, but by the surrender of a foreign Government in compliance with a requisition made by the United States under the provisions of a treaty, and being within that jurisdiction duly charged with crime, could not, as to the crime for which it would be allowable to put him on trial, ask the court to consider the provisions of the treaty under which the extradition was obtained. The court in this case did not examine the treaty, or pass any judgment upon its provisions, and did not consider for what crime or crimes Caldwell had been surrendered by the Canadian authorities to the United States.

Moreover, the question whether the proceedings were in good or bad faith, regarded as affecting the rights of the prisoner under the treaty, or the jurisdiction of the court to try him for any offense charged against him, whether it was or not the crime for which he had been demanded on the one hand, and surrendered on the other, was treated as wholly immaterial. The prisoner, whether extradited in good or bad faith, was, as a matter of fact, within the jurisdiction of the court, and there charged with crime, and that was enough, and that too whether the crime thus charged, and for which it was proposed to put him on trial, was or was not the one for which he was extradited. The fact that he was extradited for forgery, and could not have been extradited for bribery, furnished no objection to his trial for the latter offense. Such was the ruling of the court in this case.

**4. The Provisions of the Treaty.** — In order to determine whether this ruling was correct, we need to compare it with the provisions of the treaty under which the extradition was had, bearing in mind that every treaty of the United States, that is self-executing by its own terms, or for whose execution Congress has provided by law, is a part of "the supreme law of the land," and, as such, binding upon all the courts of this country, and that Congress had provided by law for the execution of the extradi-

tion stipulation of 1842, with Great Britain, and, consequently, that this specific stipulation was a part of "the supreme law of the land."

The tenth article of the treaty of 1842, with Great Britain, provides as follows :

"It is agreed that the United States and Her Britannic Majesty shall, upon mutual requisitions by them, or their Ministers, officers, or authorities, respectively made, deliver up to justice all persons who, being charged with the crime of murder, or assault with intent to commit murder, or piracy, or arson, or robbery, or forgery, or the utterance of forged paper, committed within the jurisdiction of either, shall seek an asylum or shall be found within the territories of the other : *Provided*, That this shall only be done upon such evidence of criminality as, according to the laws of the place where the fugitive or person so charged shall be found, would justify his apprehension and commitment for trial, if the crime or offense had there been committed."

The remainder of the article need not be quoted, as it is not necessary to the determination of the point under consideration. Let this treaty then, in the following particulars, be compared with the ruling of Judge Benedict :

(1.) *Enumeration of Crimes.* — The treaty enumerates seven specific crimes, as the only ones for which extradition under it can be had at all, and bribing an officer of the United States is not one of these crimes.

The plain implication from the fact of such enumeration is that the treaty intends to limit extradition, and also the exercise of the jurisdiction acquired thereby, to the list of crimes enumerated, so that no party extradited shall be dealt with for offenses committed prior to the extradition and lying outside of the list. If this be not so, then the enumeration is without any practical efficacy. Why enumerate at all if the moment the party is surrendered he may be put on trial for any offense, whether within or without the list of crimes specified? The enumeration has a reason, and that reason extends alike to the extradition and to the use of the custody acquired thereby.

And this is manifestly contrary to the ruling of Judge Benedict, who in the case of Caldwell, held that, when the custody of

the accused person has been obtained under the treaty, the court may proceed to try him for any offense properly charged against him, whether within the enumeration of the treaty or not. Such a construction utterly ignores the limitation imposed by the treaty, as to the crimes for which extradition may be had, and leaves that limitation alike without any reason for being made at all, and without any force or meaning after it is made. It turns the enumeration of crimes, and the implied limitation resulting therefrom, into a mere nullity, and alike dispossesses both of any practical significance. It certainly is not in harmony with the obvious design of the treaty.

(2.) *The Criminal Charge.* — The treaty describes the person who is to be delivered "up to justice." One item in the description is the fact that he is "charged" by the demanding Government with having committed within its jurisdiction one or more of the enumerated crimes. Another item is that he has sought asylum or is found within the territory of the Government upon which the demand is made. There can be no extradition for any crime, without a specific and definite charge of crime within the limits of the treaty.

The Government that demands the fugitive must state the crime for which it demands him, and thereby state the purpose which it wishes to accomplish in obtaining the custody of his person. This statement is the charge of crime; and the purpose, upon the very face of the case, is to bring the party to "justice" for the crime charged, and for nothing else. The Government upon which the demand is made judges, and has the right to judge, of the question whether any crime has been "charged," and, if so, whether it comes within the limits of the treaty. If either or both of these questions are answered in the negative, then it refuses to grant the extradition. If they are answered in the affirmative, then, upon proper proof of the crime, it must deliver up the accused party, or violate the treaty.

The ruling of Judge Benedict, however, proceeds upon the theory that, a specific charge of crime within the limits of the treaty having been made, and the custody of the accused party having been thus obtained, the Government, making the charge and obtaining the custody, may then, at its own option, abandon

the charge altogether, and put the party on trial for an offense, not only not within the extradition list, but not at all named or contemplated in the extradition proceedings. What it shall do with the prisoner, having once caught him, is exclusively a matter of its own sovereign pleasure, without any restraint imposed by the treaty. It was necessary to charge a crime within the enumeration for the purpose of catching the criminal; but when this is accomplished the treaty becomes a dead letter as to what shall be done with him. He may, for the purpose of procuring his extradition, be charged with a crime with no intent to try him for that crime, but with a positive intent to try him for some other crime; and thus the delivering Government may be deceived and misled in granting the surrender. This surely is not according to the plain meaning of the treaty.

(3.) *The Evidence of the Crime.* — The treaty specially provides that the delivery shall be made only “upon such evidence of criminality as, according to the laws of the place where the fugitive or person, so charged, shall be found, would justify his apprehension and commitment for trial if the offense had there been committed.”

The “criminality,” here referred to, relates solely to the crime “charged;” and, in respect to this crime, the Government asked to make the delivery determines for itself whether it is within the limits of the treaty, and, if so, whether it is proved by the specified amount of evidence. It investigates both of these questions, and decides both, before complying with the requisition. These are questions of fact, not in respect to a general allegation of “criminality,” but in respect to the charge of a specific crime. The Government upon which the demand is made has the right to know beforehand whether the specific charge is so proved as to meet the requirements of the treaty, and thereby impose the obligation of delivery.

And yet the ruling of Judge Benedict, in effect, says that when the accused party has been delivered on the charge of a specific crime, and upon evidence in proof of it deemed sufficient by the delivering Government, he may be tried and convicted of a crime, not only not within the extradition list and not charged at all in the proceedings, but also one in respect to which not a

particle of evidence in proof thereof was presented to or considered by the Government that made the delivery. The right of that Government, growing out of the stipulation of the treaty in respect to evidence, is entirely set aside by this theory.

It is well to remember that extradition is not a pleasure excursion from one country to another. It is the forcible removal of a party from one jurisdiction to another, on the charge of a definitely stated crime, and for the specific purpose of his punishment for that crime. Governments will not consent to have this done within their jurisdiction, without knowing for what and upon what evidence it is done. They hence make treaties to regulate their conduct in the premises; and one of the items of these treaties relates to the evidence upon which the crime charged, which crime it is proposed to punish, must be proved. To get possession of a man by charging a crime provided for in a treaty, and by proving it to the satisfaction of the delivering Government, and then proceed to try and punish him for a crime not charged and not proved at all when obtaining the possession, is, upon its face, a gross violation of the treaty.

(4.) *The Right of Asylum.* — The just and proper theory of every extradition treaty is that the right of asylum, as secured to a party in the country where he is domiciled and found, is, by his arrest and delivery under the treaty, impaired and withdrawn only to the extent and for the purpose specified in the extradition proceedings. The contracting Governments stipulate beforehand as to the cases and purposes for which they will withdraw this right of peaceful and unmolested asylum from any one found within their respective jurisdictions; and this implies that they will not do so in any case or for any purpose lying outside of this stipulation.

The stipulation limits the demanding and receiving Government, in the use of the custody acquired by the action of the delivering Government, to the purpose for which it was acquired. For any other or different purpose the right of asylum is not, by extradition, withdrawn from the extradited party at all. He is, as to all other purposes, if committing no offense after his extradition, "to be deemed still legally in the country from which he was extradited."

The ruling of Judge Benedict, however, proceeds upon the assumption that the moment the demanding Government gets possession of the alleged fugitive for a specific purpose within the provisions of the treaty, his right of asylum, as afforded to him in the country where he was found, is withdrawn from him to the fullest extent and for all purposes. The case, according to this ruling, is just what it would be if he had come back of his own accord to the country in which he is alleged to have committed a crime, and was there arrested, without the interposition and agency of a foreign Government, and without any treaty under which he was forcibly brought back. This manifestly is not the case which is made by extradition under the provisions of a treaty.

(5.) *The Treaty a Supreme Law.* — The treaty of 1842, with Great Britain, was, at the time Judge Benedict made his deliverance, a part of "the supreme law of the land;" and all its provisions, whether express or implied, furnished an imperative rule for his guidance in settling the question that was raised by the plea of Caldwell. Caldwell denied the jurisdiction to try him for any offense other than the one for which he was extradited, and appealed to "the supreme law of the land" in support of this denial. He had a perfect right to raise the question of jurisdiction; and if the ground he took as to the law for the court furnished by the treaty was correct, then, having been extradited for forgery, he could not be put on trial for bribing an officer of the United States. The court, according to this supposition, had no jurisdiction to try him for the latter offense, since jurisdiction was excluded by "the supreme law" of a treaty.

The truth is that the indictment for bribery, found against Caldwell, was in the then existing circumstances a dead letter, absolutely void and of no effect whatever; and he ought not to have been detained upon it for a moment. The crime charged in that indictment was not the one for which he had been demanded, not the one charged in the demand, not the one which had been proved to the satisfaction of the Canadian authorities, not the one for which he had been surrendered to the United States, and not one of the crimes enumerated in the treaty with Great Britain. These circumstances, according to the clear and



obvious implication of the treaty, which was the supreme law for the court, exempted him from trial for that crime.

The fact that the Government of the United States was prosecuting Caldwell for bribery, or that Great Britain might justly complain of the action, made no difference with the rights of Caldwell under the treaty, or with the duty of the court in giving him all the protection secured by the treaty. The prosecution, as has been shown, by the terms of that treaty, was unlawful, because it could not be had, except in violation of the treaty. This made it unlawful. The treaty was a law for the court, as well as a contract between the two Governments.

Judge Benedict, however, in disposing of the case, took no notice of the legal character and operation of the treaty. He did not examine it in this point of light at all. He did not inquire whether the right, as claimed by Caldwell under the treaty, was real or not. He said, in effect, that the matter involved in the claim is not "a proper subject of investigation in the courts." The prisoner being within the jurisdiction of the court and there charged with a crime, that was enough for his trial upon that charge, no matter whether the extradition proceedings that brought him there were "in good faith or not," and no matter what the treaty said or implied about the crime for which he could be lawfully tried. If any wrong had been done, or was being attempted, that was a question "between the two Governments" as parties to the treaty. The treaty, though by the Constitution made a supreme law for courts, could afford the party no protection.

(6.) *The Conclusion.* — The result of this comparison between the ruling of Judge Benedict in the case of Caldwell and the tenth article of the treaty of 1842, with Great Britain, is that they are in palpable conflict with each other. If the former stands as good law, it must so stand at the expense of the latter. It is difficult to conceive of a proceeding under the forms of law more entirely foreign to the nature and design of the extradition remedy, or more inconsistent with the implied obligation that results from the express stipulations of the treaty of 1842, with Great Britain, and, therefore, with the provision of the Constitution which makes a treaty a part of the law of the land, and

gives to every party, when standing before a court, whatever rights grow out of that treaty.

Any rule of criminal procedure that can be followed only at the sacrifice of a treaty is constitutionally, in that connection, a bad rule, whatever the books may say about it as a general rule in other connections. The jurisdiction of a court over a person placed at its bar, and there charged with crime, is subject to whatever qualification or limitation the express or implied obligations of a treaty of the United States may impose, and that, too, because the treaty has the character and authority of a *supreme law* for that court. It is both the right and duty of the court to hear a plea founded on a treaty, and secure to the party making the plea whatever rights the treaty secures.

The question before the court is one of law, and not the less so because a treaty furnishes the law, or because that treaty in its purely international operation is a contract between two Governments.

A treaty, among and for the people of the United States, is a law ; and courts both State and Federal, are bound so to regard and administer it, in every case to which it applies, and for the protection of every right which it secures.

## CHAPTER IX.

## THE CASE OF LAWRENCE.

This case, in March, 1876, came before the Circuit Court of the United States for the Second Circuit, and was considered and determined by Judge Benedict. (*The United States v. Lawrence*, 13 Blatch. 295.)

**1. Statement of the Pleadings by the Court.** — The following presents the substance of this statement as made by Judge Benedict, in the outset of his deliverance with regard to the case :

Lawrence, having been arrested by virtue of a bench warrant issued by the court, on the basis of an indictment charging him with a series of forgeries which by statute were offenses against the United States, interposed a special plea to the jurisdiction of the court to try him for all the forgeries alleged in the indictment. The plea consisted in setting forth the fact that under the treaty of 1842, with Great Britain, he had been extradited from Ireland and brought to this country on the charge of a single and specific forgery, for which he had been delivered up by the British authorities, and in claiming that the court had no right to try him for any other offense, committed prior to his surrender, than the one for which he had been so delivered up, until he has had the opportunity of returning to Her Majesty's dominions.

To this plea the United States filed a replication, admitting that Lawrence had been held in custody for the crimes specified in the warrant of extradition, and that he had not been tried for those crimes, and claiming "that by the laws of Great Britain and of the United States, as well as by the practice of both parties to the treaty, no limitation exists as to the number and character of the offenses for which a person extradited may be tried."

To this replication Lawrence filed a rejoinder, repeating substantially the allegations of his plea ; and to this rejoinder the Government filed a general demurrer, and on this demurrer the case came before the court.

Such is the outline of the case as presented in the pleadings and

stated by Judge Benedict; and although the judge nowhere specifically states the charge on which Lawrence was arraigned, but confines himself mainly to making a response to his plea and rejoinder, and showing the insufficiency thereof, one, unless otherwise informed, would infer from both the plea and the replication, as well as from the deliverance of the court, that the Government was seeking to put Lawrence on trial for all the crimes charged against him in the indictment, whether they were included in the extradition warrant or not. Such is the appearance as presented in the record of the case. Was this the fact?

**2. The Facts in the Case.** — That the Government was not then seeking to put Lawrence on trial for all the offenses charged in the indictment, is shown by the following facts:

Secretary Fish, in his letter of May 22, 1876, replying to the statement of Lord Derby that Her Majesty's Government had been "assured of the intention of the United States Government to try Lawrence for other than the extradition crime, for which he was surrendered," says: "Her Majesty's Government has never been thus assured, and for the very good reason that the Government of the United States has never reached any such conclusion, and has neither expressed nor formed any such intention." (*Foreign Relations of the United States*, 1876, p. 243.) This letter expressly reverses the impression one would receive from the proceedings before Judge Benedict in the previous March.

Mr. George Bliss was the District Attorney of the United States who had the direct charge of this case; and in his letter of November 22, 1877, written in response to a previous one of inquiry by the author as to the facts, he gives a general history of the case from its inception to its final completion. Upon his authority we make the following statement:

(1.) Several indictments were found against Lawrence, charging him with a number of separate and distinct forgeries, certified copies of some of which accompanied the requisition upon the British Government for his delivery as a fugitive criminal; and afterward, for special reasons, thirteen commissioners' warrants were also sent, charging him with as many different forgeries.

(2.) The examination of the case in England before Sir Thomas Henry resulted in establishing "in complete detail" the charge of forgery made in one of these warrants, for which he was afterwards indicted.

(3.) Sir Thomas Henry certified the charge to the Home office of the British Government, and on the basis thereof Lawrence was delivered up, and by the agent of the United States brought to this country, and, passing into the hands of the marshal, was committed to prison.

(4.) When all the facts in connection with the proceedings in London became known to the United States Government, "care was taken that Lawrence should not be arraigned upon or asked to plead to any charge, except the indictment for the forgery which was unquestionably proved clear through before Sir Thomas Henry."

(5.) As a matter of fact, he was never arraigned upon any other charge, although his counsel in their plea and for their own purposes "set up the contrary."

(6.) Soon after Judge Benedict rendered the decision reported in 13 Blatch., *supra*, Lawrence pleaded guilty to the charge specified in the warrant of extradition, under an arrangement which we give in the following language of the District Attorney :

"Lawrence, I feel at liberty to say, was allowed to plead guilty to the charge on which he was extradited, under a written agreement to render aid in convicting others and recovering money for the Government, in consideration of which a motion for sentence was postponed to enable him to furnish the aid. But the discretion when he should move for sentence was left wholly in the hands of the District Attorney; and it was further arranged that he (Lawrence) was not to expect a sentence of less than two years additional to the year he had already been in prison. \* \* \* \* What influenced the Government beyond what appeared in the agreement with Lawrence I never knew, though I could guess as near as most Yankees. That there was something beyond the mere aid in convicting others and recovering money, there is no doubt."

District Attorney Woodford in his letter of November 19, 1877, to the author, says: "The dockets of the Circuit Court show that on May 25th, 1876, Mr. Lawrence pleaded guilty and

gave bail and was released, sentence not being moved." The court did not sentence him because no motion was made to this effect; and the motion was omitted in consequence of the arrangement above described. This arrangement, though directly made by Mr. Bliss, was really planned by "the Cabinet at Washington," two of whose members came to New York and "saw Lawrence and his papers."

These statements show that the Government never did arraign Lawrence upon any other than the extradition charge, and never declared any such intention, though, in the Winslow correspondence, Secretary Fish asserted the right to do so. The deliverance of Judge Benedict seems to be sustaining this right, not as an abstract question, but as a right that was then sought to be exercised. He set aside "the plea to the jurisdiction and all subsequent pleadings" in the case, and gave "liberty to the defendant to plead anew to the charges in the indictment contained."

Unless otherwise informed, one would suppose that at least some of these "charges" passed beyond the circle of the extradition warrant. If they did not, then there was really no issue between the prosecution and the defendant, except the truth of the extradition charge, and no pertinency in the plea of Lawrence to the indictment on which he was arraigned.

**3. The Deliverance of Judge Benedict.** — Judge Benedict, in his deliverance, considers the several points set up by Lawrence in his plea and rejoinder, one of which, as stated by the judge, was "that all extradition proceedings, by their nature, secure to the person immunity from prosecution for offenses other than the one upon which his surrender was made." It is in relation to this question only that it is proposed to examine this deliverance.

(1.) *Denial of such Immunity.* — Having adverted to the fact that the same question was considered and settled in *The United States v. Caldwell*, *supra*, and also referred to the decision in *Adriance v. Lagrave*, 59 N. Y. 110, the judge proceeded to say: "This ground of defense is, therefore, dismissed, with the remark that an offender against the justice of his country can acquire no rights by defrauding that justice. Be-

tween him and the justice he has offended no rights accrue to the offender by flight. He remains at all times, and everywhere, liable to be called to answer to the law for his violations thereof, provided he comes within the reach of its arm."

There certainly is no objection to these general propositions, provided the phrase, "he comes within the reach of its arm," be understood to mean an ordinary coming within the reach of offended justice, or an ordinary arrest, and provided still further that a prosecution for the offense is not excluded by limitation of time. The law, as a general principle, operates upon criminals whenever and wherever it can find them, and bring its processes of trial and punishment to bear against them.

But if this coming "within the reach of its arm" means that a person accused of crime is brought within the jurisdiction through the interposition of another Government that has consented, upon specified terms and proceedings, to arrest him in its own territory, to withdraw from him the right of asylum in that territory, and to deliver him up for a distinctly expressed purpose, as was the fact in the case of Lawrence, and is the fact in every case of extradition, then the question is most materially changed. The rights of another Government, and the obligations due to that Government are involved in the very nature of the transaction. The accused party is in custody because that Government has chosen to give the custody, not for an offense committed against its own laws, but against those of another country; and whatever rights are secured to him, as incidental to the terms of the extradition, whether express or implied, must be respected, or the terms themselves will be violated.

The real point to be settled was not whether Lawrence himself had secured any immunity by flight, but whether the treaty gave him the immunity he claimed, and if so, whether the court could proceed to his trial on any but the extradition charge, without violating the treaty and disregarding "the supreme law of the land."

The general propositions of Judge Benedict, however true and just in ordinary cases, must, therefore, be taken with those modifications and limitations which are imposed by an extradition treaty. This is especially the case when the fundamental law, as is the fact in this country, makes the treaty a part of the supreme

municipal law, and hence an imperative rule to guide the action of courts. The propositions in application to an extradited person are subject to this qualification. Unless so qualified, they are not true.

(2.) *Delivery up to Justice.* — The judge further said that “the language of the treaty is calculated to repel the idea” set up by the defendant, “for it declares that the offender shall be delivered up to justice — a significant and comprehensive expression, plainly importing that the delivery is for the purposes of public justice, without qualification.” Whether this is a correct construction of the treaty or not depends entirely upon the connections in which the phrase “delivered up to justice” is used; and to these the judge made no reference.

It so happens that the treaty specifies seven crimes as the only ones for which there shall be any delivery; that it requires in each case a distinct charge of a definite crime or crimes within the list; that this crime, or these crimes, must be proved to the satisfaction of the Government asked to make the delivery; and that by these terms, which are express parts of the treaty, the “justice” referred to in it is and must be that, and that only, which lies within the circle of the terms. The connections conclusively show that the delivery is *not* for “the purposes of public justice, without qualification.” It is just the reverse. It is for a specified purpose, clearly stated and carefully guarded in the treaty; and this is a “qualification.”

To detach the phrase from its connections, and then impose a meaning upon it *ad libitum*, is not interpreting the treaty at all. There can be no delivering up to justice under this treaty for more than some one or more of seven particularly enumerated crimes, or for any one or more of these crimes, without a formal charge designating the crime or crimes for which the delivery is asked, or even then unless the crime or crimes charged shall be proved by sufficient evidence.

If this does not mean that the “justice” referred to shall be limited and qualified by these terms, then what does it mean? The conditions associated with the delivery, and forming a vital part of the transaction, show that what was so plain to the judge is just the opposite of what he states it to be. It is not possible,



with his understanding of the treaty, to invent a respectable reason for its provisions in respect to the crimes for which extradition may be had, and for the proceedings necessary to secure it. Why is extradition surrounded with these provisions if they are not meant to be limitations upon it and its purposes?

(3.) *The Act of Congress of 1848.*—Reference was made by the judge to the Act of Congress passed in 1848, by which the Secretary of State is authorized to order the offender “to be delivered to such person or persons as shall be authorized, in the name and on behalf of such foreign Government, *to be tried for the crime of which such person shall be so accused*, and such person shall be delivered up accordingly.” The words in italics are precisely the words used in the British act, passed soon after the negotiation of the treaty.

Judge Benedict, in his comment upon these words, said: “The provision of the Act of 1848 is within the broad provision of that treaty, but it does not restrict the operation of that provision; and it may be safely assumed that, if the intention to limit the effect of, or give a construction to, that or any other treaty had been entertained — assuming such a function to belong to a statute of this character — that intention would have been plainly expressed.” Let us look at this language.

By “the broad provision of that treaty” the judge evidently meant a provision for the delivery of the accused person “for the purposes of public justice, without qualification.” The assumption made is, that the treaty provision is so “broad” that it contains no “qualification,” express or implied, as to the crime for which the extradited party may be tried; and the assertion is that the act of 1848 is “within” that provision.

This is a construction of the treaty which, as we have just shown, is in conflict with its express terms. The treaty contains no such “broad provision.” The legislative acts of the two Governments for its execution are not “*within* the broad provision of that treaty,” but simply parallel with it, neither restricting nor enlarging its operation. What they propose is that the person who, according to the provisions of the treaty, *should* be delivered up, *shall* be so delivered. For what purpose? The answer of both acts is that he may be “tried for the *crime* of which such person shall be *so accused*.”

The phrase "so accused" refers to the proceedings which have been taken in the case, and which have resulted in making and establishing the specific accusation according to the provisions of the treaty. While there is no attempt in either act to change the treaty in any way, there lies upon the very face and in the language of both acts the distinct implication, which equally lies in the express terms of the treaty, that the person delivered up is to be tried *only* for an offense that is within the limits of the extradition list, and proved by the proper evidence, and of which he has been "so accused." Both acts point directly to this offense, and to no other; and this is just as true of the treaty.

Now, to infer, as Judge Benedict does, that the party having been delivered up for the crime of which he has been "so accused," may be tried for other offenses, because there is no express declaration that he shall not be so tried, is not only to draw a conclusion where there are no premises, but to run counter to the plain and natural implication of the language. If a principal should direct his agent to invest a thousand dollars in a given stock, and the latter should make the investment in some other stock, it would be a rather sorry answer for the faithless agent to say that he was not *expressly* directed not to make the investment he did make; and yet his logic and that of Judge Benedict, in this case, would not materially differ.

(4.) *The Act of Congress of 1869.*—The judge also referred to the act passed by Congress in 1869, and, remarking that the protection of extradited persons provided for in this act is "expressly limited to cases of lawless violence," proceeded to say:

"It is true that it [the act] assumes, as well it may, that the offender will be tried for the offense upon which his surrender is asked, but there are no words indicating that he is to be protected from trial for all other offenses. The absence of any provision indicating an intention to protect from prosecution for other offenses, in a statute having no other object than the protection of extradited offenders, is sufficient to deprive of all force the suggestion that the act of 1869, as a legislative act, gives to the treaty of 1842 the construction contended for by the accused."

The precise language of the act of 1869, as re-produced in section 5275 of the Revised Statutes of the United States, is as follows:

“Whenever any person is delivered by any foreign Government to an agent of the United States, for the purpose of being brought within the United States and tried for any crime of which he is *duly accused*, the President shall have power to take all necessary measures for the transportation and safe keeping of *such accused* person, and for his security against lawless violence, until the final conclusion of his trial for *the crimes or offenses specified in the warrant of extradition*, and until his final discharge from custody or imprisonment *for or on account of such* crimes or offenses, and for a reasonable time thereafter.”

It is true that the object of this act was to enable the President to take charge of an extradited person, keep him safely and protect him against lawless violence in this country; and yet while all this is true, Congress, in the language used, suggests, by the clearest implication, the very doctrine which Lawrence set up in his plea, and which Judge Benedict rejected. Let us look at the language.

The party, to be transported and protected against lawless violence, is one who has been delivered up to the agent of the United States by a foreign Government, and is described as “being duly accused,” and as “such accused person.” This plainly refers to the accusation or charge of crime made against him when the United States asked for his surrender, in order that he might be put on trial in this country for that crime. This, and this only, is the crime of which Congress was thinking when it enacted the law.

The act still further speaks of the trial of the extradited party as being “his trial for *the crimes or offenses specified in the warrant of extradition*” — that is to say, the crimes or offenses which the foreign Government found so proved as to call for his extradition, which it distinctly named in ordering his delivery to the agent of the United States, and for the trial of which the order was made. Nothing can be plainer than that Congress, when enacting this law, had no idea that the party delivered up to the United States would or could be tried for any other crimes than those “specified in the warrant of extradition.” This is the only trial referred to in the statute; it is the only trial of which Congress thought as following the extradition; and nothing can be more foreign to the clear implication of the language than the

idea that the case admits of any other trial. The understanding of Congress is distinctly indicated by the words used and not the less significantly because it incidentally appears.

It is a well settled rule in the construction of statutes, that when they affirmatively specify they exclude every thing not specified. As to things not specified, "the negative is implied as distinctly as if it were expressly declared." This rule excludes any trial for crimes and offenses other than those "specified in the warrant of extradition." The supposition that the extradited party may be tried for any *other* offenses, within or without the list of extradition crimes, not the subject of the extradition proceedings, and not specified in the warrant of extradition, is utterly inconsistent with the language used by Congress. Thus to construe the language is to misconstrue it.

(5.) *The Action of the two Governments.*—The judge further said that it has not been "made to appear that any such construction of the treaty of 1842," as excludes trial for other offenses than those specified in the extradition proceedings, "has been adopted by the Executive Department of either Government." We do not know precisely what did or did not appear; yet there are some facts in relation to the matter that might have appeared.

It is a fact that Lord Derby, in his letter of February 29, 1876, to General Schenck, then our Minister to Great Britain, written prior to the deliverance of Judge Benedict, adverted to the case of Lawrence and to the impression of the British Government that the United States Government meant to try him for other than the extradition offense, and said that this would be contrary to the implied understanding "which Her Majesty's Government had previously supposed to be practically in force," and for this reason required some assurance in regard to Winslow — whose case had then just arisen. This fact existed when Judge Benedict said that it had not been made to appear that the Executive Department of either Government had adopted such a construction of the treaty of 1842 as would preclude a trial for other than the extradition charge. (*Foreign Relations of the United States*, 1876, p. 207.)

It is further a fact that the British Parliament, in 1870, had enacted a law to which the judge refers, and which provides expressly

that British courts shall try extradited persons only for the crime or crimes proved by the facts on which their surrender was grounded, and which also provides that the Executive Department of the British Government shall not deliver up any fugitive criminal, without an assurance either given by law or by arrangement that he will not be tried for any but the extradition charge, until he has been restored or had an opportunity of returning to Her Majesty's dominions. Such was the law of Great Britain, and had been for six years, when the judge made the statement above referred to.

It is still further a fact that when the question of a new extradition treaty was under consideration in 1870, the British Government informed Secretary Fish that any stipulation for trial for any other than the extradition offense "would be inadmissible." (*Foreign Relations to the United States*, 1876, p. 228.)

It is also a fact that the Attorney-General of the United States having "a long record and an opinion of Judge Benedict" in regard to the Lawrence case placed before him, and by mistake being led to suppose that the District-Attorney designed to put the prisoner on trial for offenses not included in the extradition warrant, addressed a letter to him on the 22d of December, 1875, which speedily found its way into the public press, expressly directing that Lawrence should be tried upon the extradition "charge and that only," and saying that "grave political reasons" demanded this course. (*Id.*, p. 229.)

This letter shows that the Government of the United States was apprised that the British Government was dissatisfied with the course which, as it supposed, was about to be pursued toward Lawrence. It is not true that when Judge Benedict made his deliverance in the month of March, the British Government accepted or adopted his construction of the treaty of 1842, but is true that it most explicitly rejected it.

It is also a fact that when Lawrence was arraigned before the judge and made his plea, he was by the express order of the Government arraigned only for the extradition charge, and that the Government had never expressed any purpose of putting the theory of Judge Benedict into practice. The letter of Mr. Bliss, the District-Attorney, previously referred to, sets forth the former of these facts, and that of Secretary Fish, also previously

referred to, declares the latter fact. The Government of the United States was not doing, and was not seeking to do, but was cautiously omitting to do, what Judge Benedict entered into an elaborate argument to prove that it had the right to do. Lawrence stood before him on an indictment charging the very crime for which he had been delivered up, and there was no expressed purpose to arraign him upon any other charge.

Such were the facts when Judge Benedict said that it had not been "made to appear" that "the Executive Department of either Government" had adopted a "construction of the treaty of 1842" which excluded trial for any but the extradition charge. How far he was informed of these facts we do not know; yet he certainly was mistaken as to the position of the British Government, and he made an argument to prove a right which the Government of the United States was not attempting to exercise in respect to the party arraigned before him.

The reference to the case of Heilbronn, which occurred in 1854, is not pertinent, as will be shown in another connection, since the prosecution was a private one, and the British Government did not at the time know that the prisoner had been tried for any other crime than the one for which he was surrendered.

The case of Burley, to which the Judge referred, and which will be considered hereafter, fails to establish a practice as between the two Governments; and all that there is in the case consists, not in what was done with the prisoner, but in what was *said* by the then law-officers of the British Government, but not diplomatically said to the United States.

There are several other points in the plea and rejoinder of Lawrence to which Judge Benedict referred; but as they have no bearing upon the construction of the treaty — the only question we are considering — we pass them without notice. Whether these points were good or bad is a matter of no consequence in relation to the meaning of the treaty. That meaning, as the judge construed it in the case of Caldwell, and also that of Lawrence, allows the trial of an extradited person for any offense, no matter what, and no matter whether it is or is not included in the list of extradition crimes, and equally no matter whether it was or was not

brought under consideration in the extradition proceedings, or specified in the warrant of delivery.

The British Government, in the *Winslow* correspondence, took the ground that this is not the doctrine of the treaty, or of the principles and purposes of extradition. We think the British Government right and Judge Benedict wrong on this subject.

## CHAPTER X.

## THE CASE OF LAGRAVE.

This case was first considered by the Supreme Court of New York for the first district at Special Term, then by the Supreme Court for the same district at General Term, and finally by the Court of Appeals of the State. The object of this chapter is to present the case, as appearing in these successive stages of its history.

## SECTION I.

## THE CASE AT SPECIAL TERM.

**1. The Crime charged.** — The crime charged in the indictment against Lagrave was the statutory offense of burglary in the third degree. The treaty of 1843 with France, under which his extradition was procured, specified burglary as an extradition crime. In 1845 a supplementary treaty was made between France and the United States, which defined burglary to be the "breaking and entering by night into a mansion house of another with intent to commit felony."

Burglary, as thus defined, means the common law offense of burglary, and not the statutory offense of burglary in the third degree, as defined by the laws of the State of New York, and charged in the indictment against Lagrave. The proceedings, therefore, by which his extradition was obtained, were not in conformity with the treaty. The offense charged in this country was not really one of the offenses for which France had agreed to deliver up fugitive criminals to the United States. The French authorities were misled as to the nature of the crime charged.

The parties who were concerned in procuring the extradition of Lagrave, which was virtually a fraud upon the French Government, immediately upon his arrival in the city of New York, and while he was yet in custody, caused him to be arrested in *civil* actions brought against him, and that, too, before he had any opportunity of return to France. Their purpose was to get him



within the jurisdiction of the New York courts, in order that they might secure his arrest in a civil action.

**2. The Ruling at Special Term.** — Judge Fancher, who held the Special Term of the Supreme Court, decided, in *Lagrange's Case*, 14 Abb. Pr. R. (N. S.) 333, that the crime of burglary, in the sense intended in the treaty with France, means "the common law offense of burglary," and that the treaty does not "provide for the demand and extradition of a fugitive for our statutory offense of burglary in the third degree." The proceedings in this case he held to be "unauthorized and illegal," because the crime charged was not the one specified in the treaty.

As to the parties who, in bad faith, and for the purpose of arresting Lagrave on a civil process, had been concerned in procuring his extradition, Judge Fancher decided that they should not be permitted to profit by the trick or device through which he was brought within the jurisdiction of the court. He, hence, discharged Lagrave from the arrest in civil actions brought by these parties. The theory of this discharge was that these persons should derive no advantage from their wrongful acts.

Judge Fancher, however, stated a different rule as to an arrest on a civil process obtained by a person or persons not thus concerned in the fraudulent extradition of Lagrave. He held that Lagrave was not exempted from arrest in a civil action at their instigation. Being within the jurisdiction of the court through no device or trick on their part, he might be arrested in such action at their procurement. Lagrave was so arrested, and, after his arrest, he gave bail and in this way obtained his discharge from imprisonment.

Such, in brief, are the facts of the case as appearing at the Special Term of the Supreme Court; and such was the ruling by Judge Fancher in the light of these facts.

## SECTION II.

### THE CASE AT GENERAL TERM.

**1. Lagrave's Appeal.** — Lagrave then applied to the General Term of the Supreme Court, held by Judges Daniels, Davis, and

Brady, "to have the order for his arrest vacated because he had been brought into the United States as a fugitive from justice, under the extradition treaty existing between this country and France." He claimed that he could not be tried for any crime, or detained for any purpose, other than that for which he had been surrendered by the French Government; and in *Bacharach v. Lagrave*, appellant, and *Adriance v. Lagrave*, appellant, 4 N. Y. Supreme Ct. 215 (Thompson and Cook), the merits of this claim were considered and determined.

**2. Decision of the General Term.**—The decision of the General Term was to the following effect: 1. That Lagrave had not, by giving bail, waived his right to have the order of arrest vacated. 2. That "a person extradited is entitled to full liberty to return to his former habitation after the purposes of justice are satisfied as to the particular offense" for which he was extradited, and that "an arrest in a private action is inconsistent with that right."

The doctrine of this decision is that an extradited party, delivered up to the United States by a foreign Government on a specific charge of crime, and brought into this country for the purpose of trial and punishment, is, with the exception of that crime, entitled to a complete exemption from any arrest, whether by a criminal or civil process, that deprives him of "full liberty to return to his former habitation." He may be detained for the crime for which he was surrendered, but not for any other reason.

**3. Deliverance of the General Term.**—Judge Daniels—Judges Davis and Brady concurring—delivered the opinion of the court; and that the reader may see the theory upon which the decision rested, the following extract from this deliverance is submitted:

"It may be properly assumed in the disposition of it [the present application], that he [Lagrave] was a fugitive from justice residing in the French Republic, and only amenable to the laws of this State by force of the extradition remedy provided for by the treaty. Without the provision made, he could not have been brought here from that country; and that provided that it could be done only in a prescribed and particularly enumerated class of cases. The effect of such a specification, according to well-settled

principles of construction, is to exclude the remedy from all but the enumerated cases. As to those not mentioned, the negative is as effectually implied as though it had been expressly declared. For that reason, when the defendant was extradited it was for the purpose of answering the crime mentioned in the proceedings taken against him, and for no other purpose whatsoever. As to all other matters, being beyond the reach of the laws of this State, he was absolutely entitled to his freedom. He was extradited for a single special purpose, that of being tried for the crime for the commission of which he was removed from the protection of the laws of France. Beyond that he was entitled to the protection of those laws so far as his personal liberty would have been secured by them in case no removal of his person had been made."

"That power [France] consented, by the provision made, to surrender the person entitled in all other respects to its protection, for trial and punishment on a particularly specified charge, and for no other end or object whatsoever. Without the provision made he could not be extradited at all; and by that it can only be done for a clearly defined object. And it therefore becomes the duty of the power to which the surrender may be made faithfully to secure its proper observance."

"After the purposes of justice are satisfied as to the particular offense for which the party may be surrendered, then his right to return again to the protection of the laws he was deprived of for the single object allowed by the treaty, is clear and absolute."

"And if a detention and trial for another offense would not be proper, it would seem to be clear that an arrest of a person at the private suit of another must be denied by the same principle. It is a consequence arising out of the implication that, as to all but the extraditable offense, the accused shall enjoy the unrestrained liberty of returning to the country from which he was taken by force of the treaty provisions. Any different construction would be entirely unreasonable, and no enlightened nation would be willing to submit to it. It would be an abuse of the power provided for, allowing extradition only for clearly defined and particularly enumerated charges, and by necessary implication limiting it to those charges."

Judge Daniels added the remark that "the principle in the case is an important one, and it necessarily grows out of these treaty stipulations with other countries. They are part of the supreme law of the State, superior to those of its own enactment, by an express provision of the Constitution of the United States. And it is the duty of the courts to maintain its observance. That can-

not be done by allowing extradited persons to be arrested and restrained at the suits of private persons, unless they elect to remain in the country after their discharge from the proceedings provided for by the treaty."

The theory of Judge Daniels, as set forth in these extracts, and concurred in by the other two judges, was that extradition simply secures a special jurisdiction over the person surrendered; that when the purposes of this jurisdiction are accomplished, the extradited party is entitled to the unrestrained liberty of return to the country from which he had been removed; and, that this right being secured by a treaty which is a part of "the supreme law of the land," it is the duty of courts to enforce it.

This view proceeds upon the assumption that "the person surrendered is to be deemed still legally in the country from which he was extradited," except for the purpose specified in the extradition proceedings. To that extent, but no further, has he lost the protection of his foreign asylum in respect to offenses antedating his extradition. We say antedating his extradition, since his foreign asylum has no relation to any offenses which he may commit subsequently thereto.

### SECTION III.

#### THE CASE BEFORE THE COURT OF APPEALS.

**1. Decision of the Court.** — The decision of the General Term of the Supreme Court was, in *Adriance, Appellant, v. Lagrave*, 59 N. Y. 110, reviewed by the New York Court of Appeals. Chief Judge Church, who delivered the opinion of the court, said in conclusion: "As the present plaintiff was not concerned in the alleged fraud of procuring the defendant to be brought within the jurisdiction of the State, we can see no ground for setting aside the order of arrest. The order of the General Term must be reversed, and that of the Special Term affirmed."

This, though setting aside the decision of the General Term as a legal authority, does not affect the force of the reasons on which it was based. It may be that the logic of the reversed decision is better than that of the Court of Appeals in reversing it.

**2. The Deliverance of Chief Judge Church.** — The general ground taken by Chief Judge Church is that a party, extradited under a treaty of the United States, is not protected against detention, trial or punishment for other reasons than the particular offense for which he was surrendered. This is just the reverse of the doctrine held by the General Term of the Supreme Court, and in harmony with the ruling of Judge Benedict in the cases of *Caldwell* and *Lawrence*, already considered. He consequently held that Lagrave might be arrested and detained in a civil action, the action being brought by a party not concerned in his fraudulent extradition.

The reasoning by which the Chief Judge sought to sustain this general position is very far from being conclusive; and in regard to it the following comment is respectfully submitted:

(1.) *Brevity of the Discussion.* — It may be well to remark in the outset that the entire discussion of the question, which related to "the legal right to detain the defendant for any purposes, except the prosecution of the particular offense for which he was given up," covers about two and a half pages of an ordinary octavo. This is sufficient to show that the discussion was far from being exhaustive. It is not possible in so limited a space fully to deal with so large a subject.

(2.) *The Justice of the Principle.* — The Chief Judge, alluding to the view adopted by the General Term, and sustained by "plausible and forcible arguments," remarked: "I have examined the subject with some care, with a view, if possible, to arrive at the same result, which I regard as eminently just as a principle." Referring also to the act of Congress for the protection, against lawless violence, of persons delivered to the United States, he further said: "That these provisions ought to be extended to protection from other prosecutions or detention, I do not doubt." We have here the opinion of the Court of Appeals, speaking through its Chief Judge, that the "principle" adopted by the court below is "eminently just," and that provision ought to be made by law for carrying it into effect.

The reason for this opinion surely cannot be that there is any impropriety in putting a person on trial for an offense duly charged

against him. The law is constantly doing this in the process of bringing offenders to justice. The justice or propriety of the "principle" does not result from the rights of the extradited party, except as they may be secured to him as incidental to those of the Government that, under the stipulations of a treaty, made the delivery. The "principle" is "eminently just" to that Government; and the reason why it is so must be sought in the fact that it has a basis, either express or implied, in the treaty under which the surrender was made.

If then it be true, as the Chief Judge thinks it is true, that Congress ought to provide for the protection of extradited persons against "other prosecutions or detention," it must also be true that this "principle" is in harmony with, and naturally results from, the extradition treaties, which, so far as the United States are a party thereto, contain all the conditions and obligations in regard to the whole subject of international extradition; and hence, the Chief Judge, in what he admits, virtually grants that there is some authority for the "principle" in the treaties themselves. It is only in reference to their provisions, and the obligation arising therefrom, that it can be considered "eminently just."

(3.) *The power of Congress.* — The Chief Judge, referring to the English act which provides for the "principle" asserted by the General Term, said: "Congress doubtless has power to pass an act similar to the English act referred to, as the whole subject of extradition is confided to the Federal Government." The power here assumed to exist is not among the powers expressly granted to Congress, and not among those implied, except for the purpose of giving effect to the extradition treaties of the United States.

It so happens that the Constitution leaves the question of international extradition to be disposed of by treaty; and all the legislative power that Congress has in regard to it is that of passing laws for the proper execution of extradition treaties. It is not the province of such legislation to change the terms or character of these treaties. The treaties themselves define and limit the sphere of the legislation, unless the intention is to repeal them altogether.

If then Congress can pass an act similar to the English act, and thereby protect surrendered persons against being tried in this country, whether in Federal or State courts, for any but the extradition offense or offenses, it must be because this "principle" exists, either expressly or by implication, in the extradition treaties of the United States. If it does not so exist, Congress cannot by legislation put it there, since this would be virtually making a treaty, which Congress has no power to do.

Moreover, it is exceedingly difficult to see how Congress can limit the jurisdiction of a State court in respect to the trial of an extradited person, simply because he is such, except as it may be legislating for the execution of extradition treaties; and if these treaties contain no provisions, express or implied, protecting such persons against trial for any but the extradition offense, then manifestly Congress has no power to afford such protection, as against State authority, when that authority has acquired jurisdiction over them. It cannot, upon this supposition, make a law to control the action of a State court.

Here, again, the Chief Judge, in what he affirms in regard to the power of Congress to legislate on the subject, concedes the "principle" which it is one object of his deliverance to deny. What he affirms can be true only on the supposition that the "principle" is provided for by treaty.

(4.) *Implication in a Treaty.*—The Chief Judge also said: "Any thing necessarily implied [in treaties] is as though inserted; but can it be said that there is such an implication of agreement on the part of the United States, that the prisoner shall not be detained for any other lawful purpose? It may be conceded that such a provision would be wise and proper, but can it be regarded as *in the treaty*? I can find no authority warranting such a conclusion." The Chief Judge did not refer to the treaty with France, under which Lagrave was extradited, for the purpose of ascertaining whether it contains such a provision or not. The first article of this treaty reads as follows:

"It is agreed that the high contracting parties shall, on requisitions made in their name, through the medium of their respective diplomatic agents, deliver up to justice persons who, being accused of the crimes enumerated in the next following article,

committed within the jurisdiction of the requiring party, shall seek an asylum, or shall be found within the territories of the other: Provided, That this shall be done only when the fact of the commission of the crime shall be so established as that the laws of the country in which the fugitive or the person so accused shall be found, would justify his or her apprehension and commitment for trial, if the crime had been there committed"

It is upon these conditions, and for the purpose here specified, and for no other purpose, that the two Governments agree to withdraw the right of asylum in respect to the persons referred to, and deliver them up as fugitive criminals.

One of the conditions is, that the crime for which a person is demanded must be within the list of crimes named in the second article of the treaty. Another is, that there must be a formal charge of some one or more of these crimes. A third is, that the charge must be so proved that the laws of the country in which the fugitive is found would justify his apprehension and commitment for trial if the offense had been there committed, and, of course, that the authorities of that country are to decide in each case upon this question of adequate proof.

It is not possible to preserve, in their integrity, these conditions of the demand and the obligation of delivery, in any case in which the demanding Government, having thus acquired jurisdiction over the person, shall put him on trial for any offense, committed prior to his extradition, other than the one which was the subject of the proceedings that under the treaty secured the jurisdiction. If the party is surrendered on the charge and proof of murder, and is then tried for forgery, the surrendering Government, even though both should be extradition crimes, has been denied the right of judging whether the forgery was sufficiently proved to justify a delivery, since neither the charge nor the proof of forgery was presented to that Government.

This right is one of the provisions of the treaty; and yet, in the case supposed, it has been entirely ignored. The theory of the treaty is that there is no right of trial, as against the right of asylum, until the Government asked to make the delivery has decided that the evidence is sufficient to put the party on trial for the crime of which he is accused, and has actually surrendered



him for that purpose. To use the jurisdiction, when gained, for any other purpose is to violate the treaty itself.

We, hence, answer the questions of the Chief Judge by saying that upon the very face of the treaty with France lies the implication that the jurisdiction, acquired under it, is limited to the purpose for which it was acquired, and that it cannot pass beyond this point without disregarding some one or more of the provisions of the treaty. This limitation is, by necessary implication, "*in the treaty*." The treaty itself, in its express terms, is the highest authority to show the limitation. That which cannot be done without violating a treaty is certainly excluded by it.

(5.) *The English Extradition Act of 1870*.—Alluding to the English Extradition Act of 1870, which provides that a fugitive criminal shall not be delivered up unless by the law of the foreign country, or by arrangement, he is protected against being tried for any but the offense specified, until he has had an opportunity of returning to Her Majesty's dominions, and which secures the same immunity to persons surrendered to Great Britain, the Chief Judge remarked: "These provisions would have been unnecessary if there existed any such treaty obligation as is claimed in this case." To this two replies may be made.

The first is, that the remark has no pertinency to the question that was before the Court of Appeals. That question arose under an extradition treaty with France; and the matter of inquiry was whether Lagrave, who had been extradited under that treaty, was by it protected against any detention or prosecution, except in respect to the offense for which he was surrendered. We are at a loss to see what the English act of 1870, passed simply with reference to the execution of British extradition treaties, has to do with a treaty between the United States and France.

A second reply is, that the Chief Judge was mistaken as to the design of the English act of 1870. He assumed that it was passed by Parliament to secure to extradited persons a protection which was not, expressly or by implication, in the terms of British treaties. If such protection had been in these treaties, then, as he reasons, "these provisions" of the act would have been "unnecessary;" but because it was not, they were necessary "to meet the difficulty."

Where did the Chief Judge learn that such was the view of Parliament in passing the act? There is not a word in the act itself to indicate it; and it is not reasonable to suppose that Great Britain, one of the parties to extradition treaties, would undertake to legislate into existence obligations or principles for which there was no basis in the treaties themselves, and thus secure by law, and without the consent of the other party, results which lie beyond the provisions of these treaties.

Lord Derby in the *Winslow* correspondence says of the act: "It is to be regarded as intended to prevent, for the future, evils that were pointed out by Mr. Hammond and others, as having occurred, and being liable to occur, in private prosecutions to which the attention of the Government had not been called." (*Foreign Relations of the United States*, 1876, p. 228.) He expressly insisted that the position taken by the British Government in respect to the trial of extradited persons, and incorporated into the English act of 1870, was involved in the treaty between Great Britain and the United States, and, hence, that the act, so far from seeking to modify or add to the treaty, was simply designed to carry it into effect. He also said that the Government would take the same position, if no such act had been passed. (*Id.*, p. 257.)

It is to be remembered that the English act operates only in Great Britain, upon its courts and its executive officers. As Lord Derby says, and as Mr. Clarke, in his treatise on Extradition, says, it was intended to be curative of certain evils which had their origin in the execution of extradition treaties, and to which the attention of Parliament had been called by a committee of the House of Commons appointed to investigate the whole subject. The purpose of Parliament was not to change or repeal existing treaties, or supplement them with new and different obligations, but to provide for their execution; and, hence, the act is to be taken as an expression of its judgment as to the nature and requirements of these treaties.

(6.) *The Rule in France.* — The Chief Judge also referred to the rule adopted in France, according to which courts have nothing to do with "the conditions upon which extradition has been granted, except upon a notification from the Minister of Justice."

Their business is "to try the facts;" and, when standing before them, the criminal himself can make no plea founded on his extradition, or the treaty under which it was secured. This question is for the Government, speaking through its Minister of Justice, and not for the party arraigned on the charge of crime.

The difficulty with this reference is that the rule in France, whatever it may be — a point that we do not here pause to determine — is not pertinent when sought to be applied in this country. The Constitution of the United States makes every treaty a part of "the supreme law of the land," and requires courts to take knowledge of it as such, and apply it in cases to which it is applicable. This is a peculiarity of our political system that does not exist in France.

It is, hence, immaterial what is the practice in French courts, since American courts are subject to a fundamental law, of which treaties are a part; and if the extradition treaties of the United States, either expressly or by implication, secure to extradited persons immunity against trial for offenses other than the ones for which they were surrendered, then this is a part of "the supreme law," which every court in this country is bound to apply in any case involving the question.

This immunity, as we have previously shown, is secured in the extradition treaty of the United States with France; and hence, Lagrave, who was surrendered under that treaty, was by "the supreme law," entitled to its benefit. It was for a specified purpose, and that alone, that he was surrendered; and it was only in reference to that purpose that any jurisdiction could be acquired over his person without violating the treaty, unless he committed some crime subsequently to his surrender, or chose to remain in this country. So the General Term of the Supreme Court held; and this decision, though reversed, seems to us the only one consistent with the treaty, and, hence, with "the supreme law of the land."

(7.) *The Question of good Faith.* — The Chief Judge further said: "The indictment [of Lagrave] was for burglary in the third degree under our statute, and clearly not within the treaty; but it is not for the defendant to raise this question. The Government of France had power to surrender him for any offense, and

even if deceived and defrauded, the defendant cannot interpose in its behalf. The question of good faith is for the two Governments."

It is quite true that, as to "the question of good faith" between the two Governments, Lagrave was not the official representative of either; yet it is to be borne in mind that France delivered him up, not in the exercise of its general "power to surrender him for any offense," but under proceedings in pursuance of a treaty, and on the charge of burglary, which the French authorities must have supposed to be the burglary provided for and defined in the treaty. Such, however, was not the fact as to the crime charged against him; and on this point these authorities were mistaken, and but for this there would have been no delivery.

Lagrave was delivered for the common law offense of burglary as set forth in the treaty, and for that alone; and this was not the offense charged. He could not, of course, be tried for the offense in respect to which he was surrendered, since there was no indictment against him charging that offense; and he should not have been held, detained or tried upon any other ground, since by the terms of the treaty, and hence, by "the law of the land," no jurisdiction had been acquired over him for any other purpose.

To take advantage of the mistake, committed by the French authorities, as to the nature of the charge pending in this country, and use the jurisdiction thus acquired for a purpose different from the one for which it was intended to be granted, was not only to violate the treaty itself as a compact between the two Governments, but to disregard the rights of the surrendered party as secured to him by the law of the land.

Judge Fancher, when this case was before him, held that the whole extradition "proceeding was unauthorized and illegal." (14 Abb. Pr. R. [N. S.] 333.) If so, the treaty, both as a compact and a law, precluded any jurisdiction over Lagrave as against his right of asylum in the country from which he had been illegally removed. His arrest and delivery in France were contrary to the treaty, and his arrest and detention in this country were no better. He had a right by the law of the treaty to show this fact.

(8.) *The Question not judicial.* The Chief Judge further said : "The right of exemption from prosecution [for other than the extradition charge], if it can be said to exist at all, is based upon the good faith of the Government, which is necessarily uncertain, and is a political and not a judicial question." We have in this statement a mixture of truth and error. It is true that such a right, if secured by treaty, either expressly or by implication, binds the good faith of the Government accordingly, and is, in this sense, based upon that faith, because it is in the compact. The Government cannot in good faith institute a prosecution for any but the extradition charge.

And yet it is just as true in this country that the right, if secured by treaty, is also secured by *law*, since the treaty itself is a law ; and hence, the question, when an extradited party is arraigned for trial, whether the right exists or not under the treaty, is a question of law, and, as such, "a judicial question," no matter what course the Government, as a prosecutor, may pursue in the case. The duties and powers of the court, and the rights of the accused party by the supreme law of a treaty, do not depend upon the question whether the Government, in prosecuting that party, is observing or violating the obligations of the treaty under which he was surrendered. The treaty being a law, the court is bound to protect him against any invasion of his rights as secured by it.

The remark of the Chief Judge may be true in countries where the construction of treaties is a purely political question ; but, so far as it denies the judicial character of the matter referred to, it is not true in the United States, and cannot be, unless it is also true that extradition treaties are excepted from that provision of the Constitution which makes treaties of the United States a part of "the supreme law of the land." No one surely will pretend that the Constitution contains any exception in respect to this class of treaties. Their character as *laws* is just as clear and complete as that of treaties on any other subject.

(9.) *The cases of Caldwell and Burley.* The Chief Judge also adverted to the case of *Caldwell*, 8 Blatch. 131, decided by Judge Benedict, and to the opinion of the law officers of the British Government in the case of *Burley*. We considered in a previous

chapter the decision in the first of these cases, and simply here refer to what was then said, with the remark that the case arose under a treaty with Great Britain, while that of Lagrave arose under a treaty with France.

As to the opinion of the law officers of the British Government, in the case of *Burley*, it is to be observed that that Government, in the Winslow correspondence, rejected the opinion altogether, and declared that it was not a correct construction of the extradition stipulation between Great Britain and the United States. It is not a little remarkable that the Chief Judge should, in 1874, quote this opinion as an authority, when the English Extradition Act of 1870 had entirely set it aside as a false opinion. One would suppose that, as to the proper construction of the treaty between the two Governments, the British Parliament in 1870 was quite as good authority as the law officers of the Crown in 1864.

This comment upon the several points contained in the deliverance of Chief Judge Church is submitted, not to call in question the authority of the decision made by the Court of Appeals in this case, but for the purpose of showing that neither the decision nor the logic in support of it is consistent with the extradition treaty between the United States and France. As between the two decisions, that of the General Term of the Supreme Court, and that of the Court of Appeals, the former, though reversed, is the one which this treaty both sustains and demands. The latter decision is authoritative, but not correct. It is contrary to several decisions, to be stated in the sequel, that take exactly the opposite ground.

## CHAPTER XI.

## THE CASE OF HAWES.

The case of *The State v. Hawes* originally arose in the Criminal Court of the county of Kenton, in Kentucky, August, 1877, and, as then considered and determined, is reported in the Amer. Times Rep., vol. 4, p. 524. It was subsequently considered and determined by the Kentucky Court of Appeals, by which court the order of the lower court was affirmed. (*The Commonwealth v. Hawes*, 13 Bush, 697, or 14 Albany Law Journal, 325.)

## SECTION I.

## THE KENTON COUNTY CRIMINAL COURT.

**1. The Facts of the Case.** — The following summary presents the material facts in this case :

Hawes was demanded from the Dominion of Canada on four indictments, charging him with as many acts of forgery, and by the Canadian authorities he was delivered up on three of them, one of the four not being regarded in Canada as furnishing a sufficient ground for delivery. He was brought to trial on two of these indictments and acquitted; and the other two were dismissed on motion of the attorney for the Commonwealth. The acquittal and the dismissal therefore disposed of all the charges on which he had been extradited.

There were, however, other indictments pending against Hawes, charging him with embezzlement, an offense for which he was not and could not have been extradited. Upon one of these indictments a motion was made to bring him to trial; and whether he could be so tried was the question which came before Judge Jackson for decision.

**2. Deliverance of Judge Jackson.** — Judge Jackson, after stating the case, proceeded to say :

“ And now the question is raised by the motion under consideration, whether this court can now detain Hawes for trial of

this or the other indictments pending against him, for offenses charged to have been committed prior to his extradition, and for which he was not extradited."

Having shown that this country recognized no international extradition except as provided for by treaty, and also quoted that section of the Constitution which makes treaties a part of "the supreme law of the land," the judge further said:

"By the constitution and law of Kentucky, the prisoner (Smith N. Hawes) stands indicted for the offense of embezzlement, and he should be tried therefor and punished, if found guilty, according to the law, or acquitted if his guilt is not proven to the exclusion of a reasonable doubt, unless by the provision of the treaty of 1842, heretofore referred to, it is illegal to go into the investigation of the case at this time. If there be a treaty governing the subject that treaty, as it now is, and not as it may be by subsequent conventions or high joint commissions between the high contracting parties, is now to control. I am bound to take judicial notice of the treaty concluded at Washington on the 9th of August, 1842, between the United States and Great Britain."

Having quoted the treaty, the judge then remarked as follows:

"If, by the terms of this treaty, either expressed or implied, the prisoner, Smith N. Hawes, cannot be tried for any offense for which he was not extradited, then, although he may be within the bar of this court, or in jail under the control of this court, as this court is bound to regard that treaty, it is outside of its jurisdiction, to proceed with the trial, as 'the supreme law of the land' otherwise provides; and this whole question hinges upon the construction of the treaty."

And as to this question of construction, we have the opinion of the judge in the following extract:

"By the terms of the article of the treaty now under consideration, it is only for certain offenses that extradition will be permitted by either Government. Embezzlement is not one of those offenses. \* \* \* It is urged in argument that there is no positive stipulation against the trial of a non-extraditable offense. Why mention any offenses if a party can be tried for any and every thing not mentioned? When nations enumerate, do they not exclude every thing not enumerated? \* \* \* Here we have by this treaty a mutual agreement that certain offenders, and none others, may be extradited, to be tried. \* \* \* Now if



there be any thing agreed upon between the two high contracting parties, it was, that for the offenses therein enumerated, and for no other, there was to be a mutual surrender. \* \* For nothing else could such a demand or surrender be made; and when so made, it is monstrous that there should be a trial for any thing else. If there be any thing in the doctrine that when you enumerate rights or privileges, you are held to strictness as to the rights enumerated, and that every thing not enumerated is not included, then it follows, as a logical sequence, that the treaty here having provided only for extradition as to certain cases and under certain circumstances and proof, the right of asylum is to be held sacred as to any thing for which the party was not and could not be extradited. \* \* \* I do not mean to say that he [Hawes] may not hereafter be tried; but what I mean to say is, that in the face of the treaty herein referred to, he is not to be tried until there is a reasonable time given him to return to the asylum from which he was taken."

Judge Jackson disposed of the case in accordance with these views, and gave the prisoner the opportunity of returning to Canada by ordering his discharge from custody, which he immediately improved.

The ground taken was, that the treaty, considered as a compact between the two Governments, contemplates that the person delivered up under it shall be tried only for the extradition charge or charges, and that, considered as a law, the treaty gives him a legal right against any other trial which it is competent for him to present to a court, and which that court is bound to recognize and secure. The jurisdiction of the court to try Hawes on the charge of embezzlement, though complete under the constitution and laws of Kentucky, was according to Judge Jackson precluded by "the higher law" of the treaty.

This differs very widely from the doctrine of Judge Benedict in the cases of *Caldwell* and *Lawrence*, and from that of the New York Court of Appeals in the case of *Lagrange*, while it entirely accords with the view taken by the General Term of the Supreme Court in the last case.

**3. Treaties as Laws.** Treaties in this country are *laws* for the government of courts, both State and Federal; and it is their duty, alike in civil and criminal actions, to apply them in determining the rights of parties in suits before them, whenever they

affect those rights. The fact that they are compacts between nations, and as such, the subjects of diplomatic consideration and construction, does not change their character as laws, or release courts from the obligation of taking cognizance of them, and giving effect to them, when individual rights are involved in them, or guaranteed by them. They are not to be dismissed on the theory that they are mere compacts with which judicial tribunals have nothing to do. They are *laws* for the regulation of courts and *laws* in respect to the interests and claims of parties whose rights they affect. The Supreme Court of the United States, in the early case of *Ware v. Hylton*, 3 Dall. 199, asserted and applied this principle, and has repeatedly affirmed it in subsequent cases.

An accused party, when called to plead to an indictment, has the legal right to appeal to the *whole* law applicable to his case. If he can show that the indictment has not been found according to law in any essential particular, then it is not a legal accusation; and this fact appearing, no court has the right to put him on trial upon such a charge. And so, if a trial upon an indictment is precluded by a treaty of the United States, which in that event would be a part of the law applicable to the case, and superior to any State law, strange would it be if the party had no right to appeal to this law as a ground of defense. He has the right as a matter of law; and if the court ignores such a plea altogether, and treats the case as if no such right existed, then it will dispose of it contrary to law, and contrary to the Constitution of the United States.

We can readily understand how a court may decide that a treaty does not, as a matter of fact, secure immunity against trial for any but the extradition offense, and on this ground proceed to try the party on other charges; but we cannot understand how an American court can refuse to consider the question, treat it as non-judicial, and dismiss it as a mere matter of "good faith" on the part of the Government, when presented in the pleading of the extradited and accused party, or exclude the right of such immunity, provided it be secured by treaty. If thus secured, it is secured by the "supreme law," which every judicial officer is sworn to obey in adjudicating upon the rights of parties.

Chief Judge Church, in the *Lagrange* case, argued in some parts of his deliverance, against the existence of any such right by

treaty, and, in other parts, against the right of the accused party to present the right to a court as a ground of defense, even if it does exist. With all due respect to that distinguished jurist, we must, in the light of the previous argument, regard him as incorrect in both positions. The extradition treaties of the United States secure the right by an implication so clear that its denial is not consistent with them unless there be a special provision otherwise; and the Constitution of the United States makes these treaties a law in respect to that right, and that law is a proper basis for a plea as to the offense for which an extradited party may be put on trial.

## SECTION II.

KENTUCKY COURT OF APPEALS, APRIL 17, 1878.

### *Commonwealth v. Hawes.*

The right of one Government to demand and receive from another the custody of an offender who has sought asylum upon its soil, depends upon the existence of treaty stipulations between them and in all cases is derived from and is measured and restricted by the provisions, express and implied, of the treaty.

A fugitive from justice was, under the provisions of the extradition treaty of 1842, between this country and Great Britain, surrendered by the Canadian authorities to be tried in Kentucky upon an indictment for forgery. *Held*, that he could not, while in the custody of the court, under such surrender, be tried upon an indictment for embezzlement.

APPEAL by the Commonwealth from an order of the Kenton Criminal Court directing that the defendant, Smith N. Hawes, indicted for embezzlement, be not held in custody, and that the case against him be not placed on the docket. The facts appear in the opinion.

*T. E. Moss* and *W. W. Cleary*, for appellant.

*J. G. Carlisle* and *J. W. Stevenson*, for appellee.

**1. Statement of the Facts in the Case.** LINDSAY, C. J. Smith N. Hawes stood indicted in the Kenton Criminal Court for uttering forged paper, for embezzlement, and also upon four

separate and distinct charges of forgery. He was found to be a resident of the town of London, in the Dominion of Canada, and February, 1877, was demanded by the President of the United States, and surrendered by the Canadian authorities to answer three of said charges of forgery.

As to the fourth charge, the evidence of his criminality was not deemed sufficient, and that alleged offense was omitted from the warrant of extradition.

The demand and surrender were made in virtue of, and pursuant to, the tenth article of the treaty concluded August 9, 1842, between the Kingdom of Great Britain and the United States of America.

The attorney for the Commonwealth caused two of the indictments for forgery to be dismissed. Hawes was regularly tried under each of the remaining two, and in each case a judgment of acquittal was rendered in his favor, upon a verdict of not guilty.

After all this, however, the officers of Kenton county continued to hold him in custody, and finally, on motion of the attorney for the Commonwealth, one of the indictments for embezzlement was set down to be tried on the 6th day of July, 1877. Further action was postponed from time to time until the 21st of August, 1877, when Hawes presented his affidavit, setting out all the facts attending his surrender, and the purposes for which it was made, and moved the court to continue all the indictments then pending against him, and to surrender him to the authorities of the United States, to be by them returned or permitted to return to his domicile and asylum in the Dominion of Canada. This motion was subsequently modified to the extent that the court was asked to set aside the returns of the sheriff on the various bench warrants under which he had been arrested, and to release him from custody.

**2. Order of the Court below.** The court, in effect, sustained this modified motion, and ordered that "the cases of the *Commonwealth of Kentucky v. Smith N. Hawes*, for embezzlement, and for uttering forged instruments with intent, etc., be continued, and be not again placed on the docket for trial, and that said Hawes be not held in custody until the further order of this court."

From said order the Commonwealth has prosecuted this appeal. It is not final in its nature, but, under the provisions of sections 335 and 337 of the Criminal Code of Practice, it may nevertheless be reviewed by this court.

It was the opinion of the learned judge (Jackson) who presided in the court below, that the tenth article of the treaty of 1842 impliedly prohibited the Government of the United States and the Commonwealth of Kentucky from proceeding to try Hawes for any other offense than one of those for which he had

been extradited, without first affording him an opportunity to return to Canada, and that he could not be lawfully held in custody to answer a charge for which he could not be put upon trial.

The correctness of this opinion depends on the true construction of the tenth article of the treaty, and also on the solution of the question as to how far the judicial tribunals of the Federal and State Governments are required to take cognizance of, and in proper cases to give effect to, treaty stipulations between our own and foreign Governments.

**3. Treaties as Laws.** Section 2, article 6 of the Federal Constitution, declares that "This Constitution, and the laws of the United States, made in pursuance thereof, and all treaties made, or which shall be made under the authority of the United States, shall be the supreme law of the land, and the judges of every State shall be bound thereby, any thing in the constitution or laws of any State to the contrary notwithstanding."

It will thus be seen that with us a public treaty is not merely a compact or bargain to be carried out by the executive and legislative departments of the General Government, but a living law, operating upon and binding the judicial tribunals, State and Federal, and these tribunals are under the same obligation to notice and give it effect, as they are to notice and enforce the Constitution, and the laws of Congress made in pursuance thereof.

"A treaty is in its nature a compact between two nations, not a legislative act. It does not generally effect of itself the object to be accomplished, especially so far as its object is infra-territorial, but is carried into execution by the sovereign powers of the respective parties to the instrument. In the United States a different principle is established. Our Constitution declares a treaty to be a law of the land. It is consequently to be regarded in the courts of justice as equivalent to an act of the Legislature whenever it operates of itself, without the aid of any legislative provision." (*Foster v. Neilson*, 2 Peters, 253, per Chief Justice Marshall.)

When it is provided, by treaty, that certain acts shall not be done, or that certain limitations or restrictions shall not be disregarded or exceeded by the contracting parties, the compact does not need to be supplemented by legislative or executive action, to authorize the courts of justice to decline to override these limitations, or to exceed the prescribed restrictions, for the palpable and all-sufficient reason, that to do so would be not only to violate the public faith, but to transgress the "supreme law of the land."

A different rule seems to have been intimated in the case of *Caldwell* (8 Blatchford, C. C. Report, 131), but the real decision

rendered in that, as in the subsequent case of Lawrence (13 Blatchford, C. C. Report, 295), decided by the same judge, was, that extradition proceedings, had pursuant to the treaty under consideration, do not by their nature secure to the person surrendered immunity from prosecution for offenses other than the one upon which the surrender is made, and the intimation in Caldwell's case, that the judiciary may leave it to the executive department to interfere to preserve and protect the good faith of the Government in a case like this, is at the most but a *dictum*. The tenth article of the treaty of 1842 is as follows:

**4. The Treaty of 1842.**—“It is agreed that the United States and Her Britannic Majesty shall, upon mutual requisitions by them, or their Ministers, officers, or authorities, respectively made, deliver up to justice all persons, who, being charged with the crime of murder or assault with intent to commit murder, or piracy, or arson, or robbery, or forgery or the utterance of forged paper, committed within the jurisdiction of either, shall seek an asylum, or shall be found within the territories of the other: *Provided*, that this shall only be done upon such evidence of criminality as, according to the laws of the place where the fugitive or person so charged shall be found, would justify his apprehension and commitment for trial, if the crime or offense had there been committed; and the respective judges and other magistrates of the two Governments shall have power, jurisdiction, and authority, upon complaint made under oath, to issue a warrant for the apprehension of the fugitive or person so charged, that he may be brought before such judges or other magistrates, respectively, to the end that the evidence of criminality may be heard and considered; and if, on such hearing, the evidence be deemed sufficient to sustain the charge, it shall be the duty of the examining judge or magistrate to certify the same to the proper executive authority, that a warrant may issue for the surrender of such fugitive.”

It will be seen that the trial and punishment of the surrendered fugitive for crimes other than those mentioned in the treaty is not prohibited in terms, and that fact is regarded as of controlling importance by those who hold to the view that Hawes was not entitled to the immunity awarded him by the court below. But if the prohibition can be fairly implied from the language and general scope of the treaty, considered in connection with the purposes the contracting parties had in view, and the nature of the subject about which they were treating, it is entitled to like respect, and will be as sacredly observed as though it was expressed in clear and unambiguous terms.

Public treaties are to be fairly interpreted, and the intention of the contracting parties to be ascertained by the application of the same rules of construction and the same course of reasoning which we apply to the interpretation of private contracts.

**5. Implication of the Treaty.**— By the enumeration of seven well-defined crimes for which extradition may be had, the parties plainly excluded the idea that demand might be made as matter of right for the surrender of a fugitive charged with an offense not named in the enumeration, no matter how revolting or wicked it may be.

By providing the terms and conditions upon which a warrant for the arrest of the alleged fugitive may be issued, and confining the duty of making the surrender to cases in which the evidence of criminality is sufficient, according to the laws of the place where such fugitive is found, to justify his commitment for trial, the right of the demanding Government to decide finally as to the propriety of the demand, and as to the evidences of guilt, is as plainly excluded as if that right had been denied by express language.

It would scarcely be regarded an abuse of the rules of construction, from these manifest restrictions, unaided by extraneous considerations, to deduce the conclusion that it was not contemplated by the contracting parties that an extradited prisoner should, under any circumstances, be compelled to defend himself against a charge other than the one upon which he is surrendered, much less against one for which his extradition could not be demanded.

The consequences to which the opposite view may lead, though by no means conclusive against it, are nevertheless to receive due and proper weight.

It would present a remarkable state of the case to have one Government saying in substance to the other: "You cannot demand the surrender of a person charged with embezzlement. My judges or other magistrates have no right or authority, upon such a demand, either to apprehend the person so accused, or to inquire into the evidences of his criminality; and if they should assume to do so, and should find the evidence sufficient to sustain the charge, the proper executive authority could not lawfully issue the warrant for his surrender. But you may obviate this defect in the treaty by resting your demand upon the charge of forgery, and if you can make out a *prima facie* case against the fugitive, you may take him into custody, and then, without a breach of faith, and without violating either the letter or spirit of our treaty, compel him to go to trial upon the indictment for the non-extraditable offense of embezzlement."

And if this indirect mode of securing the surrender of persons guilty of other than extraditable offenses may be resorted to, or if the demand, when made in the utmost good faith, to secure the

custody of a criminal within the provisions of the treaty, can be made available to bring him to justice for an offense for which he would not have been surrendered, then we do not very well see how either Government could complain if a lawfully extradited fugitive should be tried and convicted of a political offense. Prosecutions for the crime of treason are no more provided against by the treaty than prosecutions for the crime of embezzlement, or the offense of bribing a public officer.

Mr. Fish, in his letter of May 22, 1876, to Mr. Hoffman, in reference to the extradition of Winslow, attempts to meet this difficulty by saying that "neither the extradition clause in the treaty of 1794, nor in that of 1842, contains any reference to immunity for political offenses, or to the protection of asylum for religious refugees. The public sentiment of both countries made it unnecessary. Between the United States and Great Britain it was not supposed on either side that guaranties were required of each other against a thing inherently impossible, any more than by the laws of Solon was a punishment deemed necessary against the crime of parricide, which was beyond the possibility of contemplation."

But President Tyler, under whose administration the treaty of 1842 was concluded, evidently thought that the guaranties of immunity to political refugees were to be implied from the treaty itself, and not left to rest alone on the public sentiment of the two countries. In communicating the draft of the treaty to the Senate for its ratification, speaking of the subject of extradition, he said:

"The article on the subject, in the proposed treaty, is carefully confined to such offenses as all mankind agree to regard as heinous and destructive of the security of life and property. In this careful and specific enumeration of crimes, the object has been to exclude all political offenses, or criminal charges arising from wars or intestine commotions. Treason, misprision of treason, libels, desertion from military service, and other offenses of similar character, are excluded."

This interpretation was cotemporaneous with the treaty itself, and deserves the higher consideration, from the fact that it was contained in a paper prepared by the then Secretary of State, Mr. Webster, who represented the Government of the United States in the negotiations from which it resulted.

It seems, also, that the extradition article of the treaty was understood in the same way by the British Parliament in 1843. The act of Parliament of that year, passed for the purpose of carrying it into effect, directed that such persons as should thereafter be extradited to the United States should be delivered "to such person or persons as shall be authorized, in the name of the United States, to receive the person so committed, and to convey him to



the United States, to be tried for the crime of which such person shall be so accused."

The precise purpose for which the fugitive is to be surrendered is set out in exact and apt language, and the act negatives, by necessary implication, the right here claimed, that the person surrendered may be tried for an offense different from that for which he was extradited, and one for which his surrender could not have been demanded.

The American Executive in 1842, and the British Parliament in 1843, seem to have been impressed with the conviction that the treaty secured to persons surrendered under its provisions an immunity from trial for political offenses far more stable and effectual than the public sentiment of the two countries. Experience had taught then that in time of intestine strife and civil commotions, the most enlightened public sentiment may become warped and perverted, just as it has taught that man is sometimes capable of committing the unnatural crime of parricide, although such a crime seemed impossible to the great Athenian law-giver.

And this view was adhered to by Congress in 1848, when the general laws providing for the surrender of persons charged with crime to the various Governments with which we had treaty stipulations on that subject, were passed. After setting out the necessary preliminary steps, it was provided by the 3d section of that act, "That it shall be lawful for the Secretary of State, under his hand and seal of office, to order the person so committed to be delivered to such person or persons as shall be authorized, in the name and on behalf of such foreign Government, to be tried for the crime of which such person shall be so accused."

This, like the act of Parliament, declares the purpose of the surrender to be that the alleged offender may "*be tried for the crime of which such person shall be so accused.*"

The maxim, *expressio unius est exclusio alterius*, may with propriety be applied to each of these acts, and read in the light of that maxim, they are persuasive at least of the construction which, up to 1848, the two contracting parties had placed on the tenth article of the treaty.

The act of Congress is, in one view, more important than the British act of 1843. It does not rest alone on the proper interpretation of a particular treaty, and may be regarded as a legislative declaration of the American idea of the fundamental or underlying principles of the international practice of extradition.

**6. Extradition only by Treaty Stipulations.** — The ancient doctrine that a sovereign State is bound by the law of nations to deliver up persons charged with, or convicted of crimes committed in another country, upon the demand of the State whose laws they have violated, never did permanently obtain in the United

States. It was supported by jurists of distinction, like Kent and Story, but the doctrine has long prevailed with us that a foreign Government has no right to demand the surrender of a violator of its laws unless we are under obligations to make the surrender in obedience to the stipulations of an existing treaty. (Lawrence's *Wheaton's on International Law*, page 233, and authorities cited.)

As said by Mr. Cushing, in the matter of Hamilton, a fugitive from the justice of the State of Indiana, "It is the established rule of the United States neither to grant nor to ask for extradition of criminals as between us and any foreign Government, unless in cases for which stipulation is made by express convention." (*Opinions of Attorney-Generals*, volume 6, page 431.)

From the treatise of Mr. Clarke on the subject of extradition, we feel authorized to infer that this is the English theory, but whether it is or not, that Government certainly would not, in the absence of treaty stipulations, surrender fugitives to a Government which, like ours, would refuse to reciprocate its acts of comity in that respect.

The right of one Government, to demand and receive from another the custody of an offender who has sought asylum upon its soil, depends upon the existence of treaty stipulations between them, and in all cases is derived from, and is measured and restricted by, the provisions, express and implied, of the treaty. The fugitive Hawes, by becoming an inhabitant of the Dominion of Canada, placed himself under the protection of British laws, and we could demand his surrender only in virtue of our treaty with that Government, and we held him in custody for the purposes contemplated by that treaty, and for no other.

**7. The Surrender of Hawes.** — He was surrendered to the authorities of Kentucky, to be tried upon three several indictments for forgery. The Canadian authorities were of opinion that the evidences of his criminality were sufficient to justify his commitment for trial on said three charges. One of the charges the Commonwealth voluntarily abandoned. He was tried upon the remaining two, and found not guilty in each case by the jury, and now stands acquitted of the crimes for which he was extradited.

It is true he was in court, and in the actual custody of the officers of the law when it was demanded that he should be compelled to plead to the indictment for embezzlement. But the specific purposes for which the protection of the British laws had been withdrawn from him had been fully accomplished, and he claimed that, in view of that fact, the period of his extradition had been determined; that his further detention was not only unauthorized, but in violation of the stipulations of the treaty under which he was surrendered, and that the Commonwealth

could not take advantage of the custody in which he was then wrongfully held, to try and punish him for a non-extraditable offense.

**8. The Doctrine in the Cases of Caldwell and Lawrence. —** To all this, it was answered that "an offender against the justice of his country can acquire no rights by defrauding that justice;" that "between him and the justice he has offended, no rights accrue to the offender by flight. He remains at all times, and everywhere, liable to be called to answer to the law for his violations thereof, provided he comes within the reach of its arm." Such is the doctrine of the cases of Caldwell and Lawrence (8th and 13th Blatchford's Reports), and of the case of Lagrave (59th New York). And if the cases of Caldwell and Lawrence could be freed from the complications arising out of the residence of the prisoners within the territorial limits of the British Crown, and the fact that we received them from the authorities of the British Government in virtue of, and pursuant to, treaty stipulations, it would be sound doctrine and indisputable law.

But did Caldwell or Lawrence come within the reach of the arms of our laws? They were surrendered to us by a foreign sovereign to be tried for specified crimes, and were forcibly brought for the purposes of those trials within the jurisdiction of our courts, and the point in issue was not whether the prisoners had secured immunity by flight, but whether the court could proceed to try them without disregarding the good faith of the Government, and violating the "supreme law?"

The legal right of a judicial tribunal to exercise jurisdiction in a given case must, from the nature of things, be open to question at some stage of the proceeding, and we find it difficult to conceive of a person charged with crime being so situated as not to be permitted to challenge the power of the court assuming the right to try and punish him.

The doctrine of the cases of Caldwell and Lawrence has been sanctioned by several prominent British officials and lawyers, and has seemingly been acted upon by some of the Canadian courts, and in one instance (that of Heilbronn) by an English court. We say seemingly, for the reason that in Great Britain treaties are regarded as international compacts, with which in general the courts have no concern. They are to be carried into effect by the Executive, and the proceedings in the courts are subject to executive control to the extent necessary to enable it to prevent a breach of treaty stipulation in cases of this kind. Hence, when a party charged with crime claims immunity from trial on account of the provisions of the treaty under which he has been extradited, he must apply to the Executive to interfere, through the law officers of the Crown, to stay the action of the court; otherwise it will

not, at his instance, stop to inquire as to the form of his arrest, nor as to the means by which he was taken into custody.

But a different rule prevails with us, because our Government is differently organized. Neither the Federal nor State Executive could interfere to prevent or suspend the trial of Hawes. Neither the Commonwealth's attorney nor the court was to any extent whatever subject to the direction or control either of the President of the United States or the Governor of this Commonwealth.

**9. The Right under a Treaty.**— But the treaty under which the alleged immunity was asserted being part of the supreme law, the court had the power, and it was its duty, if the claim was well founded, to secure to him its full benefit.

The question we have under consideration has not been passed on by the Supreme Court of the United States, and it therefore so far remains an open one that we feel free to decide it in accordance with the results of our own investigations and reflections.

Mr. William Beach Lawrence, in the 14th volume of the Albany Law Journal, at page 96, on the authority of numerous European writers, said :

“ All the right which a power asking an extradition can possibly derive from the surrender must be what is expressed in the treaty, and all rules of interpretation require the treaty to be strictly construed ; and, consequently, when the treaty prescribes the offenses for which extradition can be made, and the particular testimony to be required, the sufficiency of which must be certified to the executive authority of the extraditing country, the State receiving the fugitive has no jurisdiction whatever over him, except for the specified crime to which the testimony applies.”

This is the philosophy of the rule prevailing in France. The French minister of justice, in his circular of April 15, 1841, said : “ The extradition declares the offense which leads to it, and this offense alone ought to be inquired into.”

The rule, as stated by the German author Heffter, is, that “ The individual whose extradition has been granted cannot be prosecuted nor tried for any crime except that for which the extradition has been obtained. To act in any other way, and to cause him to be tried for other crimes or misdemeanors, would be to violate the mutual principle of asylum, and the silent clause contained by implication in every extradition.”

And when President Tyler expressed the opinion that the treaty of 1842 could not be used to secure the trial and punishment of persons charged with treason, libels, desertion from military service, and other like offenses, and when the British Parliament and the American Congress assumed to provide that the person extradited by their respective Governments should be surrendered “ *to be tried for the crime of which such person shall be so accused,*”

this dominant principle of modern extradition was both recognized and acted upon.

This construction of the tenth article of the treaty is consistent with its language and provisions, and is not only in harmony with the opinions and modern practice of the most enlightened nations of Europe, and just and proper in its application, but necessary to render it absolutely certain that the treaty cannot be converted into an instrument by which to obtain the custody and secure the punishment of political offenders.

**10. Application to the Case of Hawes.** — Hawes placed himself under the guardianship of the British laws, by becoming an inhabitant of Canada. We took him from the protection of those laws under a special agreement, and for certain named and designated purposes. To continue him in custody after the accomplishment of those purposes, and with the object of extending the criminal jurisdiction of our courts beyond the terms of the special agreement, would be a plain violation of the faith of the transaction, and a manifest disregard of the conditions of the extradition.

He is not entitled to personal immunity in consequence of his flight. We may yet try him under each and all of the indictments for embezzlement, and for uttering forged paper, if he comes voluntarily within the jurisdiction of our laws, or if we can reach him through the extradition clause of the Federal Constitution, or through the comity of a foreign Government.

But we had no right to add to, or enlarge the conditions and lawful consequences of his extradition, nor to extend our special and limited right to hold him in custody to answer the three charges of forgery, for the purpose of trying him for offenses other than those for which he was extradited.

**11. The Conclusion.** — We conclude that the court below correctly refused to try Hawes for any of the offenses for which he stood indicted, except for the three charges of forgery mentioned in the warrant of extradition, and that it properly discharged him from custody.

The order appealed from is approved and affirmed.

The above, with the exception of the side headings which have been added as a convenience to the reader, is in the exact language used by the Kentucky Court of Appeals. The legal propositions established by the case are these:

1. That the tenth article of the treaty of 1842 between the United States and Great Britain contains an implied exemption of a party, demanded and surrendered under its provisions, from

trial or punishment for any offense, committed prior to his extradition, other than the one for which he was so demanded and surrendered, until he shall have had an opportunity of returning to the country from which he was thus removed.

2. That, the extradition treaties of the United States being a part of "the supreme law of the land," a party extradited under any one of these treaties, and subsequently arraigned before a court, is entitled to appeal to the treaty as a law in making his defense, and that the court is bound to secure to him all the rights secured to him by the treaty under which he was extradited, whether these rights are thus secured in express terms, or by reasonable implication from such terms.

These propositions are in direct antagonism to the ruling of Judge Benedict in the cases of *Caldwell* and *Lawrence*, and that of the New York Court of Appeals in the case of *Lagrave*.

## CHAPTER XII.

## THE CASE OF WATTS.

The case of *The United States v. Watts*, 14 Fed. Rep. 120, was, in 1882, considered and decided by the District Court of the United States for the District of California. Judge Hoffman delivered the following opinion:

**1. The Plea and Demurrer.** — The prisoner, having been arraigned on three indictments found against him in this court, interposed a plea to the jurisdiction of the court to the effect that he had been extradited by Great Britain at the request of the United States; that the offenses charged in the requisition, and on which he has been surrendered, are other and different offenses from those alleged in the indictment to which he is now called on to plead; and that the said last mentioned offenses are not mentioned or enumerated in the treaty between the United States and Great Britain; wherefore he says that he cannot and ought not to be put on his trial for such offenses, or restrained of his liberty, except to answer to the offenses for which he was extradited. The validity of the claim set up on the part of the prisoner depends on the solution of two questions: *First.* What is the true construction of the tenth article of the treaty of 1842 between the United States and Great Britain? *Second.* How far are the judicial tribunals of the United States and of the States required to take cognizance of, and in proper cases give effect to, treaty stipulations between our own and foreign Governments?

**2. Two Preliminary Propositions.** — At the outset of this discussion two propositions may be laid down as incontrovertible:

*First.* Whatever speculative views may have been taken by jurists of America as to the duty of sovereign States, on grounds of comity or by the laws of nations, to deliver up fugitives on the demand of foreign States whose laws they are charged with having violated, in the United States it has long been the established rule "neither to grant nor to ask for extradition of criminals, as between us and any foreign Government, unless in cases for which stipulations have been made by express convention." (6 Op. Attv. Gen. 431; *Com. v. Hawes*, 13 Ky. 697; *Holmes' Case*, 14 Pet. 593; Law. Wheat. Internat. Law, 233.)

*Second.* "A treaty is in its nature a compact between two nations, not a legislative act. It does not generally effect of itself

the object to be accomplished, except so far as its object is infra-territorial, but is carried into execution by the sovereign powers of the respective parties to the instrument. In the United States a different principle is established. Our Constitution declares a treaty to be the law of the land. It is consequently to be regarded in the courts of justice as equivalent to an act of the Legislature whenever it operates of itself without the aid of any legislative provision." (*Foster v. Neilson*, 2 Pet. 253, per Chief Justice Marshall.) "When, therefore, it is provided by treaty that certain acts shall be done, or that certain limitations and restrictions shall not be disregarded or exceeded by the contracting parties, the compact does not need to be supplemented by legislative or executive action, to authorize the courts of justice to decline to override those limitations, or to exceed the prescribed restrictions, for the palpable and all sufficient reason that to do so would be, not only to violate the public faith, but to transgress the 'supreme law of the land.'" (*Com. v. Harves*, 13 Ky. 702.)

It results as a necessary consequence of the duty imposed on the courts to respect and obey the stipulations of a treaty as the supreme law of the land, that they are also charged with the duty of determining its meaning and effect, and this duty they must conscientiously and firmly perform, even though the construction they feel compelled to give to it should differ from that given to it by the political branch of the Government.

**3. The Winslow Correspondence.**—In the long and very able correspondence between Mr. Fish and Lord Derby, with reference to the extradition of Winslow, the position apparently assumed by the latter at the outset, to the effect that the British Government might, by act of Parliament, modify and introduce new conditions into an existing treaty with the United States, without the assent of the latter, seems to have been virtually abandoned. The ground finally taken by Lord Derby was that—

"The act of Parliament in question (that of 1870) imposed no condition new in substance upon the treaty of 1842, inasmuch as the true meaning of that treaty is that a person accused of a specified crime or specified crimes shall be delivered up to be tried for the crime or crimes of which he is accused, and an agreement between the two powers that the right of asylum equally valued by both shall be withdrawn only in respect of certain specified offenses, implies as plainly as if it were expressed in distinct words that in respect of the offense or offenses laid to his charge, and such offense or offenses only, is the right of asylum withdrawn; and that as a consequence, independently of the act of



1870, it is the duty of each Government to see that the treaty obligations in that respect are recognized and observed by the receiving power." (Lord Derby to Col. Hoffman, June 30, 1876.)

Mr. Fish, on the other hand, contended that the receiving power has the right, if so inclined, after having tried the extradited person on the charge on which he has been surrendered with a *bona fide* intent and effort to convict him on that one charge, to try him for any other offense of which he may have been guilty. (Mr. Fish to Mr. Hoffman, May 22, 1876; Message & Doc. Dep. State, 1876-77.)

With this important and irreconcilable divergence of opinion between these eminent statesmen the correspondence terminated, and the United States for a time declined to make or entertain any demand for the surrender of fugitives under the treaty. That it has since gone into operation is evident; but upon what adjustment, if any, of the controverted question the court is not informed. But it is understood that the assertion by the district attorney of the right and of his purpose to try the prisoner for offenses other than those for which he was surrendered, and which are not extradition crimes, is not made under express instructions from the Government. The court, however, must regard him as its representative, and as acting under its authority, and must determine the question submitted to it as if his action were taken by its express direction.

There is no reason to suppose that when the treaty was negotiated Lord Ashburton or Mr. Webster intended that the rights it conferred, or the obligations it imposed, should be other than those usually considered to result from similar agreements for the extradition of fugitives from justice. The opinions, therefore, of jurisconsults and writers of eminence on international law may profitably be considered, to ascertain what, in their judgment, are the rights and duties of the receiving power to whom a fugitive has been surrendered for trial for a specified offense.

**4. Opinions of Jurisconsults.**—In the memorable debate in the House of Lords on Earl Granville's motion for further correspondence respecting extradition, the Lord Chancellor, in an elaborate defense of the position assumed by Lord Derby, reproduces the opinions of the great jurists of the continent whom he had consulted. He cites Foelix, Kluit and Heffter, and a case mentioned in Dalloz's Jurisprudence. It is unnecessary to encumber this opinion by inserting at length the various citations from those authorities contained in the speech of his Lordship. It will be sufficient to state one of the general rules laid down by Foelix: "The person who is surrendered cannot be prosecuted or

condemned except for the crime in respect to which his extradition has been obtained." The other authorities are equally explicit. Indeed, there seems, so far as I can discover, a common *consensus* of jurists on the subject. (See 10 Amer. Law Rev. 618, and authorities cited.)

In the circular of the French Minister of Justice of 1841, the theory of the French law on the point under consideration is laid down with great fulness: "The order of extradition," he says, "states the act upon which it is founded, and that act alone should be investigated; whence it follows that if during the trial of the crime for which extradition has been granted, proofs are discovered of another crime, a new demand in extradition must be made." He goes further and holds that even if the surrender be made for a crime and also for a misdemeanor, the accused can only be put upon his trial for the former. After observing that "extradition should never be claimed or granted for trifling offenses, he adds: "Il faut une raison puissante pour faire rechercher sur la terre étrangère l'homme qui s'est puni par l'éloignement volontaire de sa patrie."

"Extradition can only be admitted with regard to a person accused of an act punishable with severe and degrading punishment (*peine afflictive ou infamante*); that is to say, of a crime other than a political crime, and not of a misdemeanor (*delit*). It follows that if extradition has been obtained of a person accused at once of a crime and a misdemeanor, he ought not to be put on his trial for the misdemeanor." (Cited in Clarke, Extrad. c. 11, p. 161.) This rule would *a fortiori* apply when it is proposed to try the person extradited for an offense for which his surrender could not have been asked and would not have been granted.

It is manifest from the foregoing that the position taken by Lord Derby finds abundant support in the opinions of continental jurists, and in the practical interpretation given by France to the rights acquired by the extradition of a criminal.

**5. The Treaty of 1842.**—I now come to the treaty itself. It enumerates seven crimes for which the surrender of the fugitive may be demanded. It will not be disputed that this enumeration is exclusive, and that the fugitive can be demanded for the enumerated crimes and for none others. No clearer case for the application of the familiar rule *expressio unius est exclusio alterius* can easily be imagined. But if any doubt be felt on the point it will be dissipated by adverting to the language of President Tyler in his message communicating the treaty to Congress:

"The article on the subject in the proposed treaty is carefully confined to such offenses as all mankind agree to regard as hein-

ous and destructive of the security of life and property. In this careful and specific enumeration of crimes, the object has been to exclude all political offenses and criminal charges arising from wars or intestine commotions. Treason, misprision of treason, libels, desertions from military service and other offenses of a similar character are excluded."

It is true that the treaty does not in terms prohibit the trial of the surrendered fugitive for crimes other than those mentioned in the treaty.

"But [as is well said by the Supreme Court of Kentucky in *Com. v. Hawes*], if the prohibition can be fairly implied from the language and general scope of the treaty, considered in connection with the purposes the contracting parties had in view, and the nature of the subject about which they were treating, it is entitled to like respect and will be as sacredly observed as though it were expressed in clear and unambiguous terms." (13 Ky. 704.)

To what end is this careful and exclusive enumeration of offenses, if, after surrender for any one of them, the person may be tried for other offenses not included in the enumeration? And what, on such a construction, becomes of the guaranty and safeguard relied on by President Tyler? Can it be supposed that the eminent persons by whom the treaty was negotiated in effect said to each other:

"You shall not demand nor will we surrender a fugitive except for the enumerated offenses; but if you can make out a *prima facie* case against him for an extradition crime, you may, after trying him for that crime and after an acquittal, which may show that he never should have been demanded or surrendered, try him for any other offense he may have committed?"

Nor is it easy to see how the surrendered person is protected from trial for a political offense, if this construction of the treaty be admitted. If he can be tried without violating the letter or spirit of the treaty for any non-enumerated offense, why not for a political offense? It has been said that public sentiment in Great Britain and the United States would render such a proceeding impossible. But President Tyler rested the guaranties of immunity to political refugees on something more stable and reliable than the prevailing public sentiment of either country. He evidently thought that they were to be implied from the treaty itself.

It has been urged that the right of asylum for political offenders is so universally recognized as sacred and inviolable that an infringement of it was, like a parricide at Athens, not to be treated as possible. But jurists of the same country are not always agreed as to what constitutes a political offense. Nor on a question so often difficult and delicate can it be expected that two Governments will always be of one mind. If, then, the right of the receiving power to try the surrendered person for any offense of which he may have been guilty (having first tried him *bona fide* for the extradition offense) be admitted, it might well happen that the receiving power might in perfect good faith hold the prisoner to answer for an offense which the surrendering power would consider strictly political in its character. But the treaty is explicit that the surrendering power is the sole and final judge, not only of the adequacy of the proofs submitted on a demand for a surrender, but of the question whether the facts proved constitute an extradition offense under its laws, and especially whether under those laws the offense is political in its character. On the construction contended for this right would practically be denied, and the immunity of political offenders so jealously maintained and carefully guarded by both the contracting parties might thus effectually be destroyed.

**6. Legislation to execute the Treaty.** — The legislation of both Great Britain and the United States appears to have given a practical construction to the treaty in accordance with the views I am attempting to maintain. The British act of Parliament of 1843, which was passed to carry into effect the treaty of the preceding year, provides (section 3) that "upon the certificate of a justice of the peace," etc., "it shall be lawful for one of Her Majesty's principal secretaries of State, \* \* \* by warrant, under his hand and seal, to order the person so committed to be delivered to such person or persons as shall be authorized, in the name of the United States, to receive the person so committed, and to convey such person to the territories of the United States *to be tried for the crime of which such person shall be so accused.*" The words "and for that crime alone," or "for none other," are not, it is true, found in the act, but the motive and object of the surrender are so explicitly stated that the statute, on every principle of fair and rational interpretation, should be construed as if those or equivalent words had been inserted. The language of our own act of Congress of 1848 is identical with that of the British act. It directs the person so committed to be delivered, etc., "*to be tried for the crime of which such person shall be so accused.*"

The same language is used in the warrant under which the fugitive is surrendered. But if, by a fair construction of the treaty,

the extradited person, after being tried for the offense of which he has been "so accused," may be tried for any other offense, neither the law nor the warrant express the whole object of the surrender. Will it be contended that any Secretary of State would venture, under the act, to issue a warrant directing the surrender of the fugitive to be tried for the offense of which he has been accused, and, after such trial, to be tried for any other offense which may be charged against him? To put this question is to answer it.

**7. Judicial Authorities.** — I will now briefly advert to the authorities. The first to which I shall refer is the case of *Com. v. Hawes*, already frequently cited in this opinion, and the able, conclusive judgment in which I have freely availed myself of, without, I fear, adding much to its force. The prisoner had been surrendered by the authorities of the Dominion of Canada for the crime of forgery. On this charge he had been tried and acquitted. He was then required to plead to an indictment for embezzlement. The court refused to try him for that offense, and directed his discharge. The ruling of the court was unanimously affirmed on appeal by the Court of Appeals of Kentucky. It will be noted that this decision was rendered in April, 1878, long subsequently to the correspondence between Mr. Fish and Lord Derby, and with full knowledge of the decisions in *Caldwell's Case*, and *Lawrence's Case*, hereafter to be noticed. It will also be observed that in this case a State court declined jurisdiction of an offense committed within the territory of a State. The court holds: (1) That the trial of extradited criminals for crimes other than those named in the treaty and in the warrant of extradition is not prohibited in terms by the treaty of 1842; but such prohibition is clearly implied from the language and general scope of the treaty, and this prohibition should be as sacredly observed as though it were expressed in clear and unambiguous language. (2) The right of one Government to demand and receive from another the custody of an offender who has sought an asylum upon its soil, depends upon the existence of treaty stipulations between them, and in all cases is derived from, and is measured and restricted by, the provisions, express or implied, of the treaty.

The same conclusion was reached by the Supreme Court of New York in the case of *Adrianse v. Lagrave*. 1 Hun, 689. The court holds that —

"When the defendant was extradited it was for the purpose of answering the crime mentioned in the proceedings taken against him, and for no other purpose whatsoever. As to all other matters, being absolutely beyond the reach of the laws of this State,

he was absolutely entitled to his freedom. He was extradited for a single special purpose, that of being tried for the crime for the commission of which he was removed from the protection of the laws of France. Beyond that, he was entitled to the protection of those laws so far as his personal liberty would have been secured by them in case no removal of his person had been made. In the language of the treaty, he was delivered "up to justice" because he was accused of one of the crimes which it enumerated, and it was implied in his surrender that he should be at liberty to return again to France when the purposes of justice had been performed in the charge made against him. The nature of the treaty, as well as good faith with the foreign power entering into it, will permit no other construction."

The prisoner was in this case discharged from *arrest on civil process*. This judgment was reversed by the Court of Appeals in 59 N. Y. 110, but not upon any claim that on the principles of international law or by the terms of the treaty a prosecution for an offense other than the offense for which surrender has been made was permissible. On the contrary, the immunity claimed is pronounced by the court "eminently just in principle." The decision turned upon the supposed inability of the court to interfere. After referring to the British act of 1870, the court observes :

"Congress doubtless has power to pass an act similar to the English act referred to, as the whole subject is confided to the Federal Government. It has exercised this power by passing an act to protect fugitive criminals from lawless violence." (15 St. at Large, 337.) "*That these provisions ought to be extended to protection from other prosecutions or detentions I do not doubt; but until this is done by the law-making power by treaty or statute, we feel constrained to hold that the courts cannot interfere.*"

The question whether the treaty did not contain by necessary implication a prohibition against the prosecution of the offender for any other crime than that for which he is surrendered does not seem to have been considered by the court, and much reliance is placed on the supposed interpretation of the treaty by the law officers of the Crown in *Burley's Case* — a case so frequently mentioned in the correspondence between Mr. Fish and Lord Derby. The decision of the Court of Appeals was rendered in 1874, long prior to the protracted and exhaustive discussion of the whole question in that correspondence and the debates in the House of Lords. It may be added that two judges, one of whom was Mr. Justice FOLGER, the present Secretary of the Treasury, dissented.

*The Case of Caldwell*, 8 Blatchf. 131, upon the authority of which the subsequent *Case of Lawrence* was decided by the same judge, appears to have been treated by him as a question, not of jurisdiction, but of privilege from arrest. The provisions of the treaty, and the question considered by the Kentucky court as to prohibitions impliedly contained in it, do not appear to have been considered, nor is any reference made to the rules of international law, the opinions of foreign jurists, or the practice of civilized nations. The opinion seems to proceed on the erroneous supposition that Great Britain had definitely acquiesced in the construction contended for; and the *Case of Heilbronn*, so fully explained in subsequent discussions, is cited as a precedent, if not an authority. The decision, it may be added, was rendered in 1871, five years before the *Case of Winslow* arose. With the greatest respect for the eminent judge who decided this case, I am compelled to dissent from his conclusions.

The suggestion of the learned Attorney-General, in his opinion on the *Case of Lawrence*, that it was intended at least by Mr. Webster, by whom the treaty was probably drawn, to extend the practice with which he was familiar in cases of surrender of fugitives from justice between the States to cases of fugitives escaping into Canada, admits of an obvious answer. The States of this Union do not occupy toward each other the relation of foreign States, in the sense in which that term is applied to Great Britain or France. All the citizens of the States are citizens of the United States. They are in no sense aliens to each other. The distribution of powers between the States and the Federal Government requires that offenses against State laws should be prosecuted within the jurisdiction, the laws of which have been violated, but no right of asylum is gained by flight into another State. If the offender has violated the laws of the United States, he may be arrested without requisition or extradition wherever found within the limits of the Union.

The act of Congress passed to carry into effect the constitutional provision for surrender of fugitives between the States, enacts that upon the demand of the executive authority of any State or Territory, for the surrender of any fugitive from justice, and on the production of an indictment found, or an affidavit made before a magistrate of any State or Territory charging the person demanded "*with treason, felony or other crime*, certified as authentic by the Governor or chief magistrate of the State or Territory from whence the person so charged has fled, it shall be the duty of the executive authority of the State or Territory to which such person has fled to cause him to be arrested," etc. Under this statute it has been held that no inquiry into the probable guilt of the fugitive can be made. The only inquiry is whether the warrant on which he is arrested states that the fugitive has

been demanded by the executive of the State from which he is alleged to have fled, and that a copy of the indictment, or an affidavit charging him with having committed "treason, felony, or other crime," certified by the executive demanding him as authentic, has been presented. Whatever the statutes of the demanding State make indictable is a crime within the Constitution and law of Congress on the subject. (*In the Matter of Clark*, 9 Wend. 212.) As the fugitive may be demanded for any crime, and as the surrendering State has no power to inquire into his probable guilt, or whether the crime for which he is demanded is made such by its own laws, it follows that when surrendered he may be tried for any crime he may have committed. But that fact lends no countenance whatever to a similar claim on the part of the receiving power under an extradition treaty with a foreign nation.

**8. Power of Courts to Secure the Immunity.**— It remains to be determined whether the immunity from prosecution for crimes other than that for which the fugitive has been surrendered can be enforced by the court, or only by the intervention of the political branch of the Government. This point has already been incidentally considered. If I am right in supposing, with the Court of Appeals of Kentucky, that the treaty, by necessary implication, prohibits the trial of the offender for any offense but that for which he has been extradited, the question is answered. The treaty is "the supreme law of the land," and as binding on the courts as a statutory enactment. If it contained an express prohibition the court would, beyond doubt, be deprived of jurisdiction. If by a just and reasonable interpretation the prohibition must be implied, the same result follows.

It may be added that, assuming that the receiving power has no right to try the fugitive except for the offense for which he has been surrendered, the immunity so guaranteed is a right of the prisoner, and can be far more surely and conveniently asserted before the courts than by diplomatic intervention. The wealthy and influential criminal might generally be able to secure the interposition of the surrendering Government for his protection. But the poor and obscure offender might have no means of drawing the attention of that Government to his case. It would be inconvenient, if not impossible, for the ambassador of the surrendering power to keep his eye on every case of an extradited fugitive with a view of interposing in case he should be put to trial for any other crime than that for which he was surrendered. If the protection of the fugitive be left solely to the political or executive power, the attempt to do so would be attended by peculiar difficulties.

In cases where the extradition has been obtained for an offense against the laws of the United States the President could easily



interfere, by directing the district attorney to abandon the prosecution. But when the criminal has been surrendered for an offense against the laws of a State (as most frequently happens), neither he nor the Governor of a State has any such power. The latter may pardon, but he cannot control the district attorney or the court. In his correspondence with Lord Derby, Mr. Fish declared his inability to give the assurance demanded by the latter. If, therefore, the immunity of the fugitive cannot be enforced by the courts, it can in the United States be effectively secured only by an amendment to the treaty or by an act of Congress, as suggested by the Court of Appeals of New York in the case heretofore cited. But this, for the reasons I have given, I believe to be unnecessary.

The only question presented for decision in the present case is whether a surrendered fugitive may be tried for an offense other than an "extradition crime." The principles attempted to be maintained, and the authorities cited, prohibit his trial for any other offense than that for which he has been surrendered. This prohibition, if rigorously applied, might often defeat justice.

If, for example, the surrender be for an attempt to commit murder, and after surrender the person assaulted should die, or if (supposing larceny to be an extradition crime) the fugitive should be surrendered for robbery or burglary, and on examination of the proofs they should be found insufficient to show the force in the one case, and the effraction of the premises in the other; or if he should be surrendered for larceny and the offense should turn out to be embezzlement, or *vice versa*, in these and similar cases the application of the rule would work a failure of justice. But it would not be difficult to provide for them by new treaty stipulations.

It might be agreed that the extradited offender should be tried for the crime for which he has been surrendered, or for some other extradition crime based on the same facts or growing out of the same transaction. In this or some other way the statesmen of the two countries, whose interests and objects in this matter are identical, could surely devise means which, while the right of asylum would be sufficiently protected, would at the same time prevent that right from being so used as to afford immunity for crime.

Demurrer overruled.

The doctrine sustained by this case is that "an extradited fugitive cannot, under the treaty of 1842 between the United States and Great Britain, be held to answer for any other offense than that for which he has been surrendered." So Judge Hoffman held, and on this ground overruled the demurrer of the United

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## CHAPTER XIII.

## THE CASE OF VANDERPOOL AND JONES.

This case, in 1883, came before the Supreme Court of Ohio, on a motion to file a bill of exceptions to the judgment of the Court of Common Pleas of Belmont county. (16 Chicago Legal News, 34.) The facts of the case are as follows:

**1. The Facts of the Case.** — The defendants, Gilbert Vanderpool and Edwin E. Jones, were indicted in the Court of Common Pleas of Belmont county, for forgery committed in 1880. Upon being arraigned they pleaded specially that prior to the finding of the indictment, they were residents and citizens of Canada, and had been extradited therefrom to the State of Ohio on an extradition warrant specifying that they were charged in Butler county with an offense within the provisions of the treaty of 1842, between the United States and Great Britain; that they had been tried in Butler county for that offense, convicted and sentenced to the penitentiary, and that the term of their imprisonment had not yet expired.

They claimed that until a reasonable time after the expiration of sentence, they cannot be tried for another offense.

On demurrer to this plea, the Court of Common Pleas so held, and remanded the prisoners to the authorities of the penitentiary, and stayed the proceedings until a reasonable time after the termination of their imprisonment, to enable them to return to Canada.

The State excepted to this decision, and asked leave, under the provisions of section 7306 of the Revised Statutes, to file a bill of exceptions to review the same.

**2. The Question Presented.** — JOHNSON, C. J. — The demurrer to the plea presents the question, whether the facts stated exempted the accused from prosecution in Belmont county until a reasonable time has elapsed after the expiration of their sentence for the crime committed in Butler county.

The State had obtained possession of the accused from the authorities of Canada, under the provisions of the Ashburton

treaty, for trial in Butler county. They were there tried, convicted and sentenced to the penitentiary for the crime upon which they were extradited. Before the expiration of this sentence the State sought to place them on trial for another crime, charged to have been committed before extradition, in Belmont county, the latter crime being one for which the accused might have been extradited.

The court of Common Pleas held, that proceedings on the indictment in Belmont county must be suspended until a reasonable time after the expiration of the sentence in the Butler county case; or in other words, that the State, having obtained possession of the criminals under the extradition treaty, could not detain them in custody and put them on trial for another crime.

**3. Obligations of the Treaty.** — It was also held, that the obligations of this treaty created a personal right in favor of the person extradited, which he could plead in suspension of a prosecution for such other crime.

By the tenth article of the Ashburton treaty, it was "agreed that the United States and her Britannic Majesty shall, upon mutual requisitions by them or their Ministers or authorities, respectively made, deliver up to justice all persons who, being charged with the crime of murder, or assault with intent to commit murder, or piracy, or arson, or robbery, or forgery, or the utterance of forged paper, committed within the jurisdiction of either, shall seek an asylum, or be found within the territories of the other; provided, that this shall only be done upon such evidence of criminality as, according to the laws of the place where the fugitive or person so charged shall be found, would justify his apprehension and commitment for trial if the crime or offense had been there committed; and the respective judges and other magistrates of the two Governments shall have power, jurisdiction and authority, upon complaint made under oath, to issue a warrant for the apprehension of the fugitive or person so charged, that he may be brought before such judge or other magistrate, respectively, to the end that the evidence of criminality may be heard and considered and if, on such hearing, the evidence be deemed sufficient to sustain the charge, it shall be the duty of the examining judge or magistrate to certify the same to the proper executive authority, that a warrant may issue for the surrender of such fugitive. The expense of such apprehension and delivery shall be borne and defrayed by the party who makes the requisition and receives the fugitive."

Independent of treaty stipulations, the obligation to surrender fugitives from justice was of an imperfect nature. It rested on comity between States. Each determined for itself the extent of this obligation and the nature of the crime and mode of surrender.

Prior to, as well as since, the treaty of 1842, it has been the settled policy both of the United States and Great Britain to furnish an asylum for persons charged in other States with religious or political offenses. Each zealously vied with the other in maintaining this right of asylum. Hence it was that the treaty of 1842 was expressly limited to seven well-defined crimes. Hence it was, also, that the right to demand a surrender in the specific cases named was so carefully guarded. The accused was protected in his asylum unless the authorities there should find him guilty of one of the crimes specified in the treaty.

By the terms of the treaty the judge or other magistrate of the Government upon whom the demand was made, is to hear and determine according to the laws of his own country whether there is a case made, and if so, to report to the proper executive authority, who shall issue a warrant for his extradition.

The right of the United States to demand the surrender of fugitives from justice found within the British dominions is purely conventional; hence, the correctness of the ruling of the court below depends on the true construction of the treaty, and also how far the judicial tribunals of the demanding Government are required to give effect to treaty stipulations; especially how far the judicial tribunals, Federal and State, can take cognizance of and enforce the provisions of the treaty upon the plea of the person surrendered.

In *U. S. v. Caldwell*, 8 Blatchf. 131, and *U. S. v. Lawrence*, 13 id. 295, Judge Benedict held that while the abuse of the provisions of the treaty or want of good faith by the demanding Government might furnish cause of complaint by the surrendering Government, yet such complaints do not form a proper subject for judicial cognizance. (See also *Adrianse v. Lagrave*, 59 N. Y. 110.)

Other cases to the same effect might be cited, but as the decisions and the views of writers upon the subject differ so widely, we are free to determine the questions from the terms of the treaty itself, guided by the well-established rules for the construction of such instruments.

**4. The Treaty a Law.**—By section 2, article 6 of the Constitution of the United States, "This Constitution, and the laws of the United States made in pursuance thereof, and all treaties made or which shall be made under the authority of the United States, shall be the supreme law of the land, and the judges of every State shall be bound thereby, any thing in the constitution and laws of any State to the contrary notwithstanding."

The treaty is, therefore, the law of the land, and the judges of every State are as much bound thereby as they are by the Constitution and laws of the Federal or State Governments. It is,

therefore, the imperative duty of the judicial tribunals of Ohio to take cognizance of the rights of persons arising under a treaty to the same extent as if they arose under a statute of the State itself.

While authority is not wanting to support the decisions in *Caldwell's Case* and in *Lawrence's Case*, *supra*, yet we submit that these decisions ignore the provisions of the Federal Constitution just cited.

Again, if it be true, that the abuse of extradition proceedings under this treaty is an offense for which the surrendering Government alone can complain, the remedy is totally inadequate, and the treaty itself may be rendered nugatory.

When, as in the present case, the surrender is to one of the States of the United States, the prisoner passes beyond the control of the Federal Government, and into that of the State. Upon complaint made by the British Government to the Federal Government of an abuse by the State of Ohio of the process under the treaty, the Federal Government could only answer as it has done in many instances heretofore, that under our system of State and Federal Government, the latter is powerless to control the State authorities. If the right under the treaty to be protected from other prosecutions can only be enforced by the surrendering nation by protest or otherwise against the one making the demand; that is, if it is a question not cognizable in the courts, it is of little value under our system of Federal and State Governments.

After the United States has secured the surrender for an offense against State law, the accused is delivered to the authorities of the State for prosecution, when all Federal control is lost. If the accused is of little or no political influence, the difficulty of giving him that protection which was intended by the treaty is so great if the courts cannot intervene, that it is of little or no value as a protection to the person extradited. We conclude, therefore, and both reason and the weight of authority support this view, that the judges of this State are bound by the provisions of this treaty, and that if it secures to the person extradited exemption from trial for crimes and offenses other than those specified in the warrant of extradition, it is the duty of the courts to take cognizance of his plea. (*Foster v. Neilson*, 2 Pet. 253; *Commonwealth v. Harves*, 13 Bush, 697; *Winslow's Case*, 10 Am. Law Rev. 617; *U. S. v. Watts*, 14 Federal Rep. 130; North Am. Rev., May, 1883, p. 497.)

**5. Implication of the Treaty.**—As to the right of the demanding Government to hold the accused and prosecute him for a different crime or offense:

This treaty is to be subject to the same rules for ascertaining

the intention of the contracting parties, as in case of other contracts.

It enumerates seven well-defined crimes for which extradition may be had. It thereby excludes all non-enumerated crimes and offenses, whether of a political or other character, and leaves the surrender in such other cases to the discretion of the Government where he is found. It limits the duty of surrender to those cases specified in the treaty in which the evidence of guilt is sufficient according to the laws of the nation where the fugitive or person charged is found, to justify his committal for trial, if the act charged had been committed there.

The right of the nation where the fugitive is found, to first hear and determine the case, and to decide upon the evidence, whether according to its own laws, the crime charged has been committed; that is, whether a case for committal has been made out, secures to the Government upon which the demand has been made the right to determine for itself whether the demand shall be complied with.

This necessarily excludes the idea that the demanding Government can decide for itself to try the prisoner, after obtaining custody, for other crimes; otherwise the purpose of the treaty is defeated.

If the demanding Government can so decide, the whole intention of the treaty could be defeated, and the right of asylum, which has been the boast of both Governments, would depend entirely on the action of the demanding Government.

To extradite under the treaty for an offense named therein, and then to retain the prisoner for a non-extraditable offense, or for a different one, though extraditable, upon which no hearing had been had as provided in the treaty, would be not only a breach of good faith by the demanding Government, but a violation of the right of asylum in favor of the accused, guaranteed to him by the treaty. The sole object of the treaty was to enable each Government to protect its citizens and inhabitants in the right of asylum, except they came within the provisions named.

**6. Implication from Legislation.** — The legislation of both Governments clearly supports this construction.

By the act of Congress of 1848, U. S. Rev. Stats., section 5272, "it shall be lawful for the Secretary of State, under his hand and seal of office, to order the person so committed to be delivered to such person as shall be authorized in the name and behalf of such foreign Government to be tried for the crime of which such person shall be so accused."

Again, by section 5275, whenever any person is delivered by a foreign Government, and brought into the United States to be "tried for any crime of which he is duly accused," it is the duty of

the President to take proper measures for his transportation and safe-keeping until the conclusion of his trial for the crimes or offenses specified in the warrant of extradition, and until his final discharge from custody or imprisonment for or on account of such crimes or offenses, and for a reasonable time thereafter, and he may employ such portion of the land or naval forces of the United States, or of the militia thereof as may be necessary for the safe-keeping and protection of the accused.

In like manner the British Parliament in 1843, for the purpose of carrying into effect this treaty, enacted that the person to be extradited should be delivered to the person authorized by the United States to receive him "to be tried for the crime of which such person shall be so accused.

While legislative interpretation of statutes is not conclusive upon the courts, yet in the case of a treaty, which is in its nature a contract between nations, enactments like these, by the high contracting parties, are of persuasive power in the construction of the treaty.

The right of the State of Ohio, over the accused, who had sought an asylum in Canada, is derived from the provisions express or implied, of the treaty of 1842.

**7. The Conclusion drawn.** — In view of the provisions of this treaty, the safe-guards therein provided against the infringement of the right of asylum, save in the specified cases and the legislation by both Governments, to carry out those provisions, we think it clear that the court below did not err in refusing to put the accused on trial for a crime, for which they were not extradited.

**8. The Winslow Correspondence.** — In the correspondence between the United States and Great Britain, which took place in 1876, growing out of the refusal of the latter to surrender Winslow, except upon a stipulation by the former, that he should not be tried for another offense, the conflicting views of the two Governments are stated. Winslow had been demanded as a fugitive charged with forgery. Great Britain refused to deliver him, unless the United States would stipulate that he should not be tried, except for the crime charged. This was refused, and an extended correspondence was the result. Finally, the British Government, as a temporary measure, and until a new treaty was made, suspended its claim to require such a stipulation.

Time will not permit an analysis of the claims of the two Governments. It is sufficient to say that it discloses a contrariety of views by eminent statesmen and publicists upon the question at issue, and that the refusal by the United States to make the stipulation demanded, was based chiefly on the ground that the de-



mand was unusual, and was a reflection upon our Government, after a successful execution of the treaty for near forty years, without such a stipulation.

If it be conceded that the United States asserted the right to retain an extradited prisoner, and try him for another crime, that claim is not conclusive upon the courts. Nothing was then settled as to the true construction of the treaty.

If, as we hold, the question is one of personal right under the treaty, as well as of international law, it follows that the courts can hear and determine such right when it is invaded.

Much more might be said in support of our conclusions, but we content ourselves with a reference to the following decisions and discussions on the subject:

*Commonwealth v. Hawes*, 13 Bush, 697; *U. S. v. Watts*, 14 Fed. Rep. 130; Letter of Wm. B. Lawrence, 19 Albany Law Journal, 329, on "Extradition"; North Am. Rev., May, 1883, 497; Title Extradition, Whart. Cr. Pl. and Pr., §§ 38 to 57, and cases cited; *Blanford v. The State*, 10 Texas, 627. In the matter of Frank Cannon, 47 Mich. 481; Spear on Extradition, Ch. 4, pp. 65, 74; 10 Am. Law Rev. 617; *Compton, Ault & Co. v. Wilder*, 40 Ohio St.

Leave refused.

The principles affirmed by the ruling in this case are these: 1. That a person, extradited under the provisions of the treaty of 1842 between the United States and Great Britain, cannot be detained in custody and prosecuted for a different crime than the one for which he was delivered up. 2. That the provisions of the treaty, being a part of the law of the land, are enforceable by the judicial tribunals of the States, in behalf of persons so detained and prosecuted.

## CHAPTER XIV.

## THE CASE OF EX PARTE KER.

This case was an application to the Circuit Court of the United States for the Northern District of Illinois, in October, 1883, for a writ of *habeas corpus*, in behalf of Frederick M. Ker. (18 Fed. Rep. 167.) Judge Drummond, who held the court, refused to issue the writ, for reasons which he stated, as follows, in his deliverance :

**1. Statement of the Facts.**— The defendant was charged with the offense of larceny and forgery committed within the jurisdiction of the court where the two indictments have been found. In considering the question we may assume, for the purpose of this motion, that these offenses were actually committed. After they were thus committed the defendant left the country and fled to Peru, in South America. While there he was under the protection of the laws of Peru, and could not be legally removed therefrom except in accordance with the laws of that country.

The United States had made a treaty under which Peru agreed, in the manner therein stated, to return to the United States certain offenders who had fled to that country and claimed the protection of its laws. Of course, Peru was only bound to return the offender in the manner stated in the treaty. It has been said in argument, that a person could not be returned who had escaped from justice from the United States and had taken refuge there, in any other way than under the terms of the treaty ; that perhaps is true, provided there was no other way, under the laws of Peru. I do not know that the fact that a treaty was made between the United States and Peru, by which the latter State agreed to return fugitives from justice to the United States, prevented that country from declaring under its own laws, that persons might be returned to the United States independent of the treaty. All that I wish to insist on is, that the defendant, being in Peru, was under the protection of its laws and could only be legally removed by virtue of the law of that State, and of course, the treaty made between the United States and that country was the law of that State. Certain steps were taken on the part of the Government of the United States, at the request of the executive of this State, to procure the extradition of the defendant from Peru to Illinois, where the offenses were committed. Accordingly, the requisition under the law was made by the execu-

tive of the United States, upon the authorities of Peru, for the return of Ker.

**2. Ker Kidnapped in Peru.** — Owing to some cause, which is not stated in the petition, the steps pointed out in the law were not taken; a demand seems not to have been made upon the authorities of Peru; but the defendant was seized, it may be conceded, without any authority on the part of the United States and without any consent on the part of Peru, by private persons; he was placed on board the United States ship *Essex*, in a port of Peru, transferred to the Sandwich Islands, and thence to San Francisco, within the territory of the United States. For the purpose of placing him under the authority of the law of the United States if he came within the State of California, a requisition from the Governor of Illinois upon the Governor of California was made and a warrant issued by the Governor of that State.

It is said, and I suppose it is uncontroverted, that at the time this process was given by the Governor of California, the defendant was not within the territory, and so was not subject to the process or authority of the executive of that State. However this may be, in the same manner it may be admitted that he was taken in Peru and under the same authority, no more and no less, he was taken to San Francisco, to Illinois, and to the county of Cook, where the offenses were committed. When brought here there had been a process issued from a competent court on an indictment found in that court against him for the offenses which it was alleged he had committed, and under that process he has been taken into custody, and now, it is claimed, he should be released because of the circumstances connected with his arrest and capture in Peru, and his transfer from that country to the United States. It is claimed that this vitiates — what otherwise would be legal — the process under which the arrest had taken place and he is now held in custody.

**3. The Question of Law.** — The question is whether this is so in point of law. It is said that while in Peru he was under the protection of the treaty which had been made between the United States and Peru, and that his seizure and transfer were a violation of the treaty stipulations between the United States and Peru. This is only true in a qualified sense. While in Peru he was not under the protection of the laws of the United States, but of the laws of Peru, and if he was taken contrary to the provisions of the treaty between the two countries, he was taken in violation of the laws of Peru; but in one sense it may be said he does not come within the protection of the treaty between the United States and Peru. That treaty does not guarantee protection to all citizens of

the United States who may be within the territory of Peru. It is the laws of Peru that protect the citizens of the United States who may for the time be domiciled in or inhabiting Peru. So that it can hardly be said, in the ordinary sense of the language used, that he was under the protection of the treaty between Peru and the United States. True, he could not, it may be, be legally transferred from one State to the other except in the mode pointed out by the treaty unless there was some law of Peru which authorized it to be done. If the act so done was against the laws of Peru, for that violation the party has his remedy under the laws of Peru, enforceable here or elsewhere, and not, properly speaking, under the laws of the United States.

The United States, by this treaty, does not guarantee it will protect every citizen or inhabitant of Peru that may come to the United States. If a Peruvian here has a trespass committed against him, he has his remedy under our laws; so it is in Peru; while the citizen of the United States is there, he is under the protection of its laws. While this, I think, is true, still I am willing to admit there is force in the view taken by the counsel for the defendant in this case. Our judgment and our feelings naturally rebel against an act done in the manner in which this was done, as stated in the petition, namely, by a person without authority of law, without any process, seizing one claimed to have fled from justice and taken refuge in Peru, and bringing him to the United States, thus committing what is claimed to be an outrage upon personal rights and personal liberty; and we naturally desire in all proper cases, to give protection to the party who has thus been outraged, and when he asks for it to give him adequate compensation for the wrong that has been done. The question is, is that this case?

**4. The Real Question.** — The real question is, whether because of this private wrong that has been done in taking possession of the person of the defendant, to be brought to the State of Illinois, that vitiates and destroys the process that has been issued from a competent court, for the offense or offenses charged against the defendant so as to prevent his arrest? In view of the authorities which have been cited on the argument, I cannot say that the case is so clear as to authorize the court to issue the writ; or, if it were issued and served, to discharge him from custody on this account. The consequences of the discharge are so very serious, that the court may well pause before reaching this conclusion; because the result would be that the defendant might escape from all trial for these offenses. Once left at liberty, of course he necessarily would evade trial, unless he remain here until this protection is withdrawn from him, and if he escapes from it, as

he has already tried to do, because he was once captured, it does not follow that he will be captured a second time.

It seems to me that it is not competent for the court to look into the circumstances under which the capture was made and the transfer of the defendant from Peru to the United States in order to free him from the consequences of the lawful processes which have been served upon him for the offense or offenses which he has actually committed within the county of Cook and State of Illinois.

5. **The Cases Cited.** — The only cases which have been cited which seem to have some bearing upon the question involved here are those which have arisen in cases where parties have been transferred from a foreign country to the United States, where treaties have existed under which the extradition of the party was made from a foreign country to the United States for the commission of a particular offense. Some have held, and such seems to be the opinion of Mr. Spear, who has written a work on the law of extradition, that where a party has been arrested, under the authority of a treaty, in a foreign country and transferred to this country for the commission of an offense here, that he cannot be tried for a different offense. Perhaps it may be said the weight of authority is in accordance with that view.

But that case is not this. Here, though certain measures were taken by which to transfer the defendant from Peru to this country, yet they were never carried into effect, the final steps, in other words, were not taken; although the writ or authority was issued it was not executed as required by its terms, and it may be said that the parties took the law into their own hands, throwing aside the writ or process which had been issued, and which was in the hands of one of the parties, who thus committed violence upon the defendant's rights. Here, therefore, the defendant had not been taken under the authority of law, and in pursuance of the terms of a treaty between the United States and a foreign country, from that country to this. He has been taken, I repeat, simply by what we may call physical force, by those having him in custody. The Government has not interfered at all. It has been done under the law of the stronger, and not under written, or statute or common law.

So that this case is not within those decisions, while it clearly is within the authority of other decisions which were cited on the argument. As I have said, if I were clear in the view that this defendant should be released, I would issue the writ and discharge him. It is, because I am not clear that I decline to issue the writ, the consequence of which would be his discharge; in other words, I am not satisfied that he ought to be discharged from custody.

**6. The Refusal not Final.** — I am the more inclined to this view because by this decision he does not lose the protection of the treaty if he is entitled to it, for he can set it up in the indictments which have been found against him, and the process which has been issued from the State court; and he can take the opinion of the Supreme Court of the United States upon the question, if he is entitled to the immunity he claims under the treaty, after the case has passed through the various courts of the State; or he can, I suppose, go to the Supreme Court of the United States and apply for a writ of *habeas corpus*, and if he is entitled to it that court can give him the protection of the treaty.

So that, in deciding the case in this way, I do not deprive him ultimately of any remedy which he has under the treaty between Peru and the United States; and I may add that, in view of the conflict between some of the State courts and some of the inferior courts of the United States upon this subject, it is very desirable that this question, confessedly of the greatest importance, and now occasionally arising, should be decided by the Supreme Court of the United States. So that, not being satisfied that the petitioner is now entitled to be discharged from the writs which have been issued against him, I shall not direct the writ of *habeas corpus* to issue, for, if issued and served upon him, I should not, as at present advised, release him from custody.

**7. Comment on this Case.** — Judge Drummond, in his decision of this case, treated it without any reference to the treaty between the United States and Peru. It is true that extradition proceedings under the treaty were commenced, but they were never consummated. The matter of fact is that Ker was not extradited at all. He was simply captured by private parties without any authority of law, and brought into this country without any delivery on the part of the Peruvian Government. The treaty between the two Governments had nothing to do with his being within the jurisdiction of the State court, or with his being there arrested and held on the indictments found against him. His case was just what it would have been, if there had been no treaty, or if he had been captured by private parties in some other country. The treaty, not being the basis of his removal to the United States, had no application to the case, and hence gave him no immunity or protection.

The only question before Judge Drummond was whether, as a general principle of law, the manner in which Ker was brought within the jurisdiction of the State court, and there arrested and

held on legal indictments against him, furnished a good reason in law why the prisoner should, on *habeas corpus*, be discharged from custody; and this question he answered in the negative. He might very properly have considered a preliminary question; and that is whether, upon the showing of the facts, he had any jurisdiction over the case.

Section 753 of the Revised Statutes of the United States specifies the only cases in which the Federal courts or judges may issue the writ of *habeas corpus*; and the only recital in the list that could by any possibility apply to Ker, is the one in which a party is in custody in violation of a treaty of the United States. This recital did not apply to the case, since the treaty with Peru had nothing to do with the custody by which Ker was held; and, hence, Judge Drummond, in the circumstances, had no jurisdiction to discharge him on *habeas corpus*, even if he was unlawfully held. The only jurisdiction that could reach the case was that of a State court or State judge.

## CHAPTER XV.

## BRITISH EXTRADITION PRECEDENTS.

The diplomatic correspondence between Great Britain and the United States, with reference to the case of Winslow, related to the question whether the treaty of 1842 between the two Governments provides, either expressly or by implication, that a party extradited under it on the charge and proof of a specific crime, shall not, until he has had a reasonable opportunity to return to the jurisdiction from which he was thus removed, be tried for any offense committed prior to his extradition within the jurisdiction of the receiving Government, other than the one for which he was demanded and surrendered, and further, whether the delivering Government has the right, under the treaty, to insist that the receiving Government shall thus limit its action in respect to the trial.

Secretary Fish answered both of these questions in the negative, and Lord Derby answered both in the affirmative; and neither convinced the other.

The argument of Secretary Fish, while omitting any analysis of the provisions of the treaty itself, consisted mainly in the citation of precedents, supporting, as he alleged, his view. Some of these precedents are British; and, hence, they were presented as *argumenta ad hominem* for the consideration of the British Government. We propose in this chapter to state the leading cases thus referred to, and ascertain their pertinency and significance with reference to the matter in dispute.

**1. The Case of Heilbronn.**—The first case is that of Heilbronn, who, in 1854, was extradited from the United States to Great Britain, and in regard to whom Secretary Fish says: "The facts, as stated by the Solicitor-General of Great Britain, who had charge of the proceedings, and who was examined before the late British commission on the extradition question, were that the prisoner, being extradited for forgery, was acquitted, and was thereupon tried and convicted for larceny, an offense for which



he could not have been surrendered, not being enumerated in the list of crimes mentioned in the treaty." (Foreign Relations of the United States, 1876, pp. 213, 214.)

Mr. Mullens is the person to whom the Secretary alludes as the "Solicitor-General of Great Britain," but who held no such office at the time, and acted simply as the solicitor in a private prosecution, with which the British Government had nothing to do.

The answer of Lord Derby in respect to this case is as follows :

"Her Majesty's Government much regret that a charge was made against the prisoner not justified by the extradition warrant under which he was received ; but though the charge was preferred according to the ordinary forms of criminal procedure in Her Majesty's name, it is the well-known course of law in this country that every private individual has the power of presenting an indictment, while, as a matter of fact, the presenting or finding of that indictment is entirely unknown to any person representing the executive Government. Her Majesty's Government must repeat that this departure from the extradition warrant in the case of Heilbronn was not the act of Her Majesty's Government, nor was it called to their attention or known to them ; and Her Majesty's Government are not aware of any other instance which has occurred in this country, during the long period that has elapsed since 1842, where a person surrendered under the treaty of 1842 has been put upon his trial for an offense other than that in respect to which his extradition was demanded." (Id., p. 259.)

The Lord Chancellor of England, alluding to this case in his speech in the House of Lords, said :

"When he [Heilbronn] was tried here this actually occurred : the judge at once said that the facts showed that the offense committed was embezzlement and not robbery, and the man was tried and sentenced for the former offense, for which he ought not to have been surrendered under the terms of the treaty. That would not have been very creditable to the Government if they had ever heard of it ; but the Government never heard of it. It was never brought to their notice at the time of the prosecution, or until it was mentioned by the committee of the other house in 1868." (Id., p. 292.)

His Lordship, if correctly reported, was mistaken as to the crime on which Heilbronn was extradited. It was not robbery, but forgery.

Mr. William B. Lawrence, in an article published in the Albany

Law Journal (vol. 14, p. 91), refers to a letter written January 4, 1875, by Sir Thomas Henry, the English magistrate to whom extradition matters were confided, in which the writer says: "It will be seen that it was a private prosecution, which was conducted by Mr. Mullens, as solicitor for the private prosecutor, and that the English Government had nothing whatever to do with the trial, and probably knew nothing about it. The trial took place in 1854, more than twenty years ago, and at that period the law of extradition was very little known, either in England or the United States, and it did not occur to any one to raise an objection to the prisoner being tried for a second offense."

These statements effectually dispose of the case of Heilbronn. The British Government had no knowledge of the proceeding at the time, and was made aware of it only by the report of a committee of the House of Commons in 1868. The prosecution was a private one, and what was done was the act of the judge who tried the case, and not of Her Majesty's Government. The Government of the United States was not apprised of the facts. The question, whether a person extradited on a specific charge can be tried for any other offense than the one for which he was surrendered, was not raised before the court, and no decision was made in regard to it. Sir Thomas Henry says that it did not occur to any one to raise such a question.

Lord Derby admits that the proceeding was "not justified by the extradition warrant," and expresses the regret of Her Majesty's Government that there was such a departure from this warrant. Neither Government was appealed to at the time; and, hence, neither, by acquiescence and approbation, or by protest, placed any construction upon the treaty of 1842. The case, in the light of these facts, plainly has no significance as a precedent.

**2. The Case of Von Aernam.** — The second case is that of Von Aernam, who, in 1854, was surrendered by the United States to the authorities of Upper Canada, upon the charge of forgery. Mr. Clarke, in his treatise on Extradition (2d ed., p. 101), mentions this case, and refers to 4 Upper Canada Reports (C. P.), 288.

It appears that, after Von Aernam's committal in Canada, an

application was made for his release on bail, on the ground that the evidence of the *corpus delicti* was not sufficient, and that at the most the offense was simply that of obtaining money under false pretenses, which was not within the treaty. In answer to this application, and denying it, Chief Justice Macauley said: "The committing magistrate has transmitted copies of the depositions, etc., before him, but they are not all that may be reasonably supposed to exist. It is not necessary to express an opinion on the point, but I am much disposed to regard the instrument as a forged bill; and even if the prisoner's offense amounted to false pretenses only, I should hesitate to bail him under the circumstances under which he has been taken, surrendered and received into custody. Being in custody, he is liable to be prosecuted for any offense which the facts may support."

The question before the court, and the only one upon which it passed judgment, was, not for what offense the prisoner should be tried, but whether he should be admitted to bail. The court was inclined to the opinion that the offense was that of forgery, which was the crime specified in the extradition proceedings; but, if it were simply that of false pretenses, the decision was not to grant the application for bail. The remark incidentally fell from the lips of Chief Justice Macauley, that, "being in custody," the prisoner "is liable to be prosecuted for any offense which the facts may support;" and this remark is the only part of the utterance which Secretary Fish quotes.

This case, in being neither pertinent nor authoritative, lacks the cardinal qualities of a good precedent. It is not pertinent, because the question considered and decided by the court is entirely different from the one under discussion between Lord Derby and Secretary Fish. Chief Justice Macaulay, in the words quoted, simply stated a general rule of criminal law which no one disputes; but in stating that rule he expressed no opinion as to the proper construction of the treaty of 1842 between Great Britain and the United States, and especially as to the rights upon which each might insist, under the provisions of the treaty, in respect to the trial of extradited persons. No such question was before him or decided by him; and what he said in denying an application for bail is not to be forced out of the relations in which the utterance was made.

Nor is the precedent any better as an authority. If the words used really mean all that they were quoted to prove, they would not furnish a precedent binding upon the British Government, unless it could be shown that the Government, having knowledge of them, had adopted them as an expression of its views. To make a single sentence, casually falling from the lips of a provincial judge, when denying an application for bail, an authority as against Her Majesty's Government as to the proper construction of an international compact, is immensely to overrate its importance, especially so when that compact was not the subject-matter of the utterance, and not necessarily involved in its meaning. We may hence dismiss this precedent as being neither pertinent nor authoritative, and, of course, of no value in settling the point that was under discussion.

**8. The Case of John Paxton.**—The third case is that of John Paxton, who, in 1866, was extradited from the United States to Lower Canada, on the charge of forgery. The charge brought against him in Canada was that of uttering a forged promissory note, knowing it to be forged. His plea was that he could not be tried except for the specific crime set forth in the extradition proceedings. The facts of the plea were denied in the replication; and a jury, having been empanelled to try the issue of fact, found "that the prisoner was extradited for forgery, whereas he is actually indicted for uttering forged paper."

On a motion to set aside this verdict and grant a new trial, made by the prosecutor before the Queen's Bench, it was decided by two judges against one that the question submitted to the jury was not a proper one for a jury to determine, that a new trial of that issue should not be granted, and that the prisoner should plead and answer forthwith to the indictment found against him. Though he protested against being tried for uttering forged paper, when he had been extradited on the charge of forgery, he was, nevertheless, tried and found guilty on the former charge; and, the sentence being postponed, the verdict was subsequently confirmed by the Court of Appeal, consisting of the same judges, with the addition of Chief Justice Duval. (10 Lower Can. Jurist, 11, 212, 352, and Clarke on Extradition [2d ed.], pp. 98-100.)

The court, in this case, proceeded upon the assumption that the defendant had no standing at its bar, except to plead to the indictment found against him. It, hence, tried him for the offense charged in the indictment, without any reference to the terms of the treaty under which he had been extradited, or the proceedings under that treaty, or to the question whether the offense thus charged was or was not the one for which he had been surrendered by the United States.

This was, in practice, the adoption of the French doctrine, which assigns the construction and application of extradition treaties to the political department of Government, and leaves the judiciary nothing to do but simply try offenders for the crimes charged against them, without inquiring into the form of their arrest, or the mode in which they were brought within its jurisdiction.

The proceeding in this case manifestly has no application whatever, considered as a precedent, to the point in dispute between the two Governments in respect to Winslow.

Lord Derby and Secretary Fish were not discussing the question whether a person, extradited under the treaty of 1842, and afterward standing before a court of justice and there charged with crime, could himself set up, as a plea of defense, that the crime for which he was about to be tried is not the one for which he was surrendered, and on this ground claim, as a legal right, that the court has no jurisdiction to try him for that crime. They were not disputing about any question of right or jurisdiction as between the prisoner and the court before which he was arraigned. Their question related to the proper construction of the treaty itself, with reference to the inquiry whether it, expressly or by implication, stipulates that the party surrendered shall be tried only for the offense for which the surrender was made, and hence whether the delivering Government, and not the prisoner, has the right to insist that the jurisdiction acquired by the surrender shall be limited to this purpose. Their question was one of diplomacy as between the two Governments, and not one of law as between the prisoner and the court.

Upon this point the court in the case of Paxton expressed no opinion, and passed no judgment; and, hence, its action has no pertinency whatever to the matter which was the subject in con-

troversy. Let it be granted, for the sake of the argument, that the prisoner cannot make the treaty the basis of a legal right in respect to the crime for which he may be tried; and it does not follow that the surrendering Government cannot claim in respect to him the rights which flow from the treaty. The two questions are entirely distinct.

It is quite true that if it were an established and well-known rule, in the courts of different countries, when dealing with extradited persons, to pay no attention to the fact of their extradition and try them for any crime legally charged against them, and if Governments should make extradition treaties, and deliver up fugitive criminals to each other, with a full knowledge of this fact, and with no provisions in those treaties, express or implied, qualifying or limiting the application of the rule, then, indeed, the facts would show a tacit acquiescence in the rule on the part of these Governments, and thus it might become a rule of international law. This is conceivable, but it is not real. No such fact of long and general acquiescence exists or has ever existed.

The few cases in which the question, whether an extradited person can be tried for any offense other than the one for which he was surrendered, has been considered by courts, falls very far short of establishing any such rule; and, in these cases even, the decisions have not been uniform one way or the other. No one will pretend that such a rule exists as a general usage of nations.

**4. The Case of Rosenbaum.** — The fourth case is that of Rosenbaum, occurring in Canada in 1874, in respect to which Secretary Fish says that "the discharge of the prisoner was claimed because there was no prohibition under the laws of the United States against the trial of criminals for offenses other than those for which they were extradited, as required by the [English] act of 1870." (*Foreign relations of the United States, 1876, p. 235.*) Secretary Fish quotes two remarks made by Mr. Justice Ramsay, of the Supreme Court of Canada.

The first remark is the following: "If it were recognized as a principle of international law that a prisoner extradited could only be tried for the crime for which the extradition took place, it would not have been necessary for the Imperial Parliament to

make these provisions." The provisions referred to are those of the English act of 1870.

There are three answers to this remark. The first is, that the primary and main question between Lord Derby and Secretary Fish was not whether such immunity is secured to an extradited prisoner by "international law," independently of treaties, but whether it was involved in the treaty of 1842 between Great Britain and the United States. The second is, that the text writers on international law, who have referred to the subject at all, recognize and with great uniformity affirm the "principle" which Mr. Justice Ramsay states as an hypothesis, simply for an argumentative purpose. The third is, that the object of the provisions referred to in the English act, as Lord Derby asserts, and as the reason of the thing clearly implies, was not to gain ends that lie beyond the scope of British extradition treaties, including that with the United States, but to secure their proper execution according to the construction placed upon them by the "Imperial Parliament."

It is not to be assumed that Parliament, when passing a law for the execution of these treaties, consciously and deliberately designed to insert in the law a "principle" entirely unknown to them, and in excess of their provisions, and that, too, without the consent of the other parties to these treaties. The assumption contradicts all the probabilities and proprieties of the case, and withal is not sustained by a particle of evidence. The proper view of the English Extradition Act is that Parliament judged it to be suitable legislation to carry into effect the provisions and purposes of existing extradition treaties.

The other remark of Mr. Justice Rameay is as follows: "I am not, however, aware that it has been laid down in England, that a man, once within the jurisdiction of English courts, could set up the form of his arrest, or the mode by which he came into custody, as a reason for his discharge when accused of crime." This remark plainly has no pertinence to the question under discussion between Lord Derby and Secretary Fish. That question, as previously observed, related, not to what the prisoner might plead in his defense as a ground of "discharge," but to what the delivering Government might under the treaty claim in his behalf.

Nor has the remark any significance, as a rule of law, when sought to be applied in this country to the trial of extradited persons. The Constitution makes the treaties of the United States a part of "the supreme law of the land;" and, as such, they are a rule for courts. British treaties, however, have no such character in England or Canada, except as they are invested with it by law. Now, it might be true, in Great Britain and Canada, that the form of one's arrest and the mode by which he came into custody would be circumstances of no legal consequence in reference to the crime for which it would be allowable to try him; yet it does not follow that the same would be equally true in the United States.

If the extradition treaties of the United States, either expressly or by implication, do secure to an extradited person immunity against trial for any offense other than the one for which he was surrendered, and if a given person, having been surrendered to the United States on a specific charge of crime, is sought to be put on trial for some other offense, then the form of his arrest and the mode by which he came into custody are, as matters of law, vital circumstances in the case. The treaty, under which he was surrendered, is, upon the supposition stated, a law in respect to the crime for which he may be tried. He has a legal right to claim a "discharge" as against detention or trial for any other crime, committed prior to his extradition, than the one for which the surrender was made. Whether an extradited party has the same legal right in England or Canada does not affect the question, one way or the other, in the United States.

There are, hence, two serious difficulties with the second remark of Mr. Justice Ramsay. One is its irrelevancy to the point under discussion between the two Governments; and the other is its insignificance, considered as furnishing a rule by which to determine what an American court may or may not do in dealing with an extradited person.

**5. The Case of Burley.**—The fifth case is that of Burley who, in 1864, was demanded from Canada by the United States, on the charge of having committed robbery on board the steamer "Philo Parsons" on Lake Erie. He claimed in Canada that he acted as an officer in the service of the Confederate States, then



at war with the United States, and, hence, that he was protected against the charge by the right of belligerency ; and yet he was surrendered by the Canadian authorities.

Mr. Clarke, in his work on Extradition (2d ed., p. 90), says that when Burley was brought to trial in the State of Ohio, "the judge ruled that if the acts complained of had a belligerent object, and were done under the authority of a Confederate commission, the *animus furandi* was wanting and he must be held not guilty. The jury disagreed, and the prisoner, being released on moderate bail, did not reappear." That was, consequently, the end of the case, so far as the prisoner was concerned.

Judge Fitch, who tried this case, told the jury that "the theft must be found to have been made with felonious intent," and that the prisoner "had a right, if commissioned, to take the boat, money, or other property for the furtherance of his Government." He also said that "a state of war existed between the Federal Government and the Confederate Government, so called, and it made no difference whether the United States Government admitted it or not." "The charge was applicable only to a state of war." He consequently held that, "as a soldier of the Confederate States Government, he [Burley] had a soldier's right to capture the steamer and appropriate her, and any money belonging to her to the cause of his Government." (Foreign Relations of the United States, 1876, p. 264.)

The language of Judge Fitch implies that robbery was the offense for which Burley was tried ; and his doctrine is that, if the prisoner acted as a soldier of the Confederate Government, the "state of war" secured to him immunity against conviction on this charge.

The importance of this case grows out of the fact that, under the apprehension that Burley was about to be tried for piracy, the attention of the British Government was called to it, and that the question whether this would be consistent with the treaty of 1842 was submitted to the then law officers of the Crown. The evidence taken in 1868 by the select committee of the House of Commons on Extradition, contains the following statement as to this case, made before the committee by the Right Hon. Edmund Hammond, the permanent under Secretary for Foreign Affairs :

"It was suggested that the American Government contemplated putting him [Burley] on his trial for piracy, which, however, did not prove to have been the case; but he seems to have been charged in the United States, though not before the Canadian authorities, with assault with intent to commit murder. The question was referred to the law officers in this country, and it was held that, if the United States put him *bona fide* on his trial for the offense in respect to which he was given up, it would be difficult to question their right to put him upon his trial also for piracy or any other offense which he might be accused of committing within their territory, whether or not such offense was a ground of extradition or even within the treaty." (Answer, 1032.)

"We admit in this country that if a man is *bona fide* tried for the offense for which he was given up, there is nothing to prevent his being subsequently tried for another offense, either antecedently committed or not." (Answer, 1036. See Clarke on Extradition, 2d ed., *note*, pp. 90, 91.)

Secretary Fish refers to this opinion of the then law officers of the British Government, as sustaining his view, and inconsistent with that of Lord Derby. He hence uses the opinion as an argument of the *ad hominem* character. (Foreign Relations of the United States, 1876, p. 214.)

What then did the British Government do with this opinion, and especially what did it say to the Government of the United States? Lord Russell, in a dispatch dated February 25, 1865, to Mr. Burnley, Her Majesty's representative at Washington, after referring to the application made in behalf of Burley, proceeded to say:

"I have to state to you that having considered this application in communication with the proper law officers of the Crown, Her Majesty's Government are of opinion that if the United States Government, having obtained the extradition on the charge of robbery, do not put him on his trial upon this charge, but upon another, namely, piracy (which, if it had been made before the Canadian authorities, they might have held not sufficiently established to warrant his extradition), this would be a breach of good faith against which Her Majesty's Government might justly remonstrate. If, however, the United States Government does *bona fide* put Burley on his trial for the offense in respect to which he was given up, it seems to Her Majesty's Government that it would be difficult to question the right of that Govern-

ment to put him upon his trial for piracy also, or any other offense which he may be accused of having committed within their territory, whether such offense was or was not a ground of extradition, or even within the treaty. Accordingly Her Majesty's Government can only so far comply with the application of Mr. Burley, senior, as to instruct you to protest against any attempt to change the ground of accusation upon which Burley was surrendered in pursuance of the treaty." (Foreign Relation of the United States, 1876, pp. 261, 262.)

This is what Her Majesty's representative was directed to say in regard to the case. What he did say we have in the following communication to Secretary Seward:

"Her Majesty's Government, having considered this application, are of opinion that if the United States Government, having obtained the extradition on the charge of robbery, do not put him on his trial upon this charge, but upon another, namely, piracy (which, if it had been made before the Canadian authorities, they might have held not sufficiently established to warrant his extradition), this would be a breach of good faith against which Her Majesty's Government might justly remonstrate. Her Majesty's Government are, therefore, willing, should the grounds upon which Burley is to be tried take the above turn, to comply so far with the application of Mr. Burley, senior, as to instruct me to protest against any attempt to change the ground of accusation upon which Burley was surrendered in pursuance of the treaty." (Id., p. 292.)

This letter, addressed to Secretary Seward on the 15th of March, 1865, was a formal protest against putting Burley on trial for piracy when his extradition had been obtained on the charge of robbery, and against any attempt to change the ground of accusation upon which he was surrendered. It did not communicate to Mr. Seward that part of the dispatch of Lord Russell, in which his Lordship adopts the opinion of the law officers of the Crown. That opinion sustains the doctrine of Secretary Fish, with the qualification that the extradited person must first have a *bona fide* trial upon the charge in respect to which he was given up. Lord Russell adopted it, and communicated it to Her Majesty's representative at Washington, but the latter did not communicate it to the Government of the United States.

Mr. Seward, on the 20th of March, 1865, replied to the protest as follows:

"Sir, I recur to your note of the 15th of March, which relates to B. G. Burley. The Honorable the Attorney-General informs me that it is his purpose to bring the offender to trial in the courts of the States of Ohio and Michigan, for the crimes committed by him against the municipal laws of those States, namely: robbery and assault with intent to commit murder. He was delivered up by the Canadian authorities upon a requisition which was based upon charges of those crimes, and also upon a charge of piracy, which is triable, not by State courts, but by the courts of the United States. I am not prepared to admit the principle claimed in the protest of Her Majesty's Government, that the offender could not legally be tried for the crime of piracy under the circumstances of the case. Nevertheless, the question raised upon it has become an abstraction, as it is at present the purpose of the Government to bring him to trial for the crimes against municipal law only." (Id., p. 280.)

The answer of Mr. Seward shows that he regarded the letter of Mr. Burnley as a protest against putting Burley on trial for piracy, when, as the case was stated to him by the representative of the British Government, he had been delivered up simply on the charge of robbery. He says that he was not prepared to admit the principle set forth in the protest, but held that Burley, having been surrendered, as he understood it, upon the charge of piracy, as well as upon that of robbery and an assault with intent to commit murder, might be tried for the piracy. The question, however, was a mere "abstraction," since the Government did not propose to try him on the piratical charge.

There was evidently some confusion of understanding between the two Governments as to the charge on which Burley was extradited; yet, so far as Mr. Seward was officially informed, the attitude of the British Government was simply that of a protest against his trial for piracy, on the ground that this was not the offense for which the prisoner had been surrendered. Secretary Fish, in the Winslow correspondence, says that Burley was tried for assault with intent to commit murder, which Mr. Seward understood to be embraced in the charge on which he was delivered up; and in regard to this statement Lord Derby remarks that the British Government had no knowledge of this fact, if fact it was, until so informed by Secretary Fish in 1876. (Id., p. 281.)

We have, then, in this case, the following facts:

(1.) That the law officers of the Crown, being consulted, did express the opinion that if the United States put Burley on trial, *bona fide*, for the crime in respect to which he had been surrendered, it would be allowable to try him afterward for piracy, or any other crime of which he might be accused, whether within the treaty or not, and whether committed before or after his extradition.

(2.) That Lord Russell, in his dispatch to Mr. Burnley, having expressed the opinion that it would be a breach of good faith to put Burley on trial for piracy when he had been delivered up simply on the charge of robbery, qualified the expression by adopting and stating the opinion of the law officers of the Crown, and then directed Mr. Burnley "to protest against any attempt to change the ground of accusation upon which Burley was surrendered in pursuance of the treaty."

(3.) That Mr. Burnley, in his letter to Mr. Seward, made the protest as directed, but said nothing about the opinion of the law officers of the Crown, or its adoption by Lord Russell.

(4.) That Mr. Seward, not informed of this opinion, regarded the letter as a protest against trying Burley for piracy, when, as the British Government understood and officially stated the case, he had been surrendered simply on the charge of robbery.

All, then, that there is in this case, considered as a question of *actual* diplomacy between the two Governments, is exactly in harmony with the general doctrine maintained by Lord Derby in 1876. What is not in harmony with that doctrine is the opinion of the law officers of the Crown, adopted by Lord Russell, but not communicated to the Government of the United States. It was not the subject of any correspondence between the two Governments; and the United States had no knowledge of it until after the case was entirely disposed of. The most that can be said is that such an opinion was held by one party to the treaty, but was not communicated to the other, or made the basis of any action as between the two parties. It never became a diplomatic fact; and this very materially changes its character, considered as an *argumentum ad hominem* addressed in 1876 to the British Government.

7. The Case of Caldwell. — The sixth case is that of Caldwell

examined in a previous chapter so far as the action of the United States is concerned, but not with reference to the action of the British Government. Caldwell was extradited from Canada to the United States on a charge of forgery, and was not tried for that offense at all, but was in 1871 tried and convicted on the charge of bribing an officer of the United States. Being apprised of the purpose of the Government to try him for the latter offense, he addressed a memorial to the Governor-General of the Dominion of Canada, asking his interposition to prevent a trial for any other than the extradition offense.

This memorial was transmitted to Her Majesty's Secretary of State for the Colonies. The Secretary, in his reply to the Governor-General, says that he has been in communication with Her Majesty's Secretary of State for Foreign Affairs in regard to the case, and that the opinion of the law officers of the Crown has been taken upon it. He further says that Her Majesty's Government are advised that there is no occasion for "claiming the surrender of the petitioner from the United States Government;" that, as it appears, "he has been duly indicted for the offense by reason of which he was surrendered, and it seems that he is to be tried for it;" and that "Her Majesty's Government are further advised that there is nothing in the convention which would preclude the indictment of the petitioner in the United States for an additional offense which is not enumerated in the convention, so long as such proceedings were not substituted for proceedings against him on the charge by reason of which he was surrendered." (Foreign Relations to the United States, 1876, pp. 265-268.)

No correspondence was opened by the British Government with the United States in regard to this case; and hence it here ended so far as the action of the former was concerned. The British Government, supposing that Caldwell had been "duly indicted for the offense by reason of which he was surrendered," and that he was about "to be tried for it," thought that he might be tried "for an *additional* offense" not enumerated in the treaty, "so long as such proceedings are not substituted for proceedings against him on the charge by reason of which he was surrendered." The fact in the case is that Caldwell was not tried at all on the charge of forgery. That charge was abandoned, and

"proceedings" on the charge of bribing an officer of the United States were "substituted," under which he was tried, convicted and punished.

The opinion of the British Government that, having been *bona fide* tried for the extradition offense, the prisoner might thereafter be put on trial for "an *additional* offense," does not come up to the doctrine of Secretary Fish, who excluded this qualification altogether, and passes beyond the doctrine maintained by Lord Derby, who insisted that there could not, in consistency with the treaty, be any trial except for the offense for which the party was surrendered. It does not perfectly fit the doctrine of either. It contradicts that of Secretary Fish in part, and that of Lord Derby in part. The British Government 1871 supposed that the United States were about to do, and only to do, what Lord Derby in 1876 claims as the only thing that was allowable; and yet it then expressed an opinion as to trial for "an additional offense," which Lord Derby in 1876 held to be incorrect.

The Lord Chancellor of England, in his speech in the House of Lords, disposes of this case by simply saying: "I think that the less said about the case of Caldwell the better." (Id., p. 293.)

Lord Derby, in his speech in the House of Lords, deals with the case and that of Burley more seriously. After saying, in regard to Caldwell, that "the decision not to interfere in the matter was communicated to the Governor of Canada, and there the case ended so far as we are concerned," he proceeded to say:

"Now, I am not about to deny that these two cases show clearly enough that the view of our international duty taken by the then law officers is different from that which we have been advised to adopt. But I deny altogether that that difference of views disposes of our case. I speak with the highest respect of the legal advisers of the Governments of 1864 and 1870, but they would not claim that their opinion could bind their successors. And I observe this, that though they do not advise that in certain cases a claim should be pressed, though they express doubt whether it ought to be pressed, yet in no part of this correspondence has the claim ever been abandoned. We have never said to the American Government that we thought it one which could not be justly advanced. We have simply forborne to press it in certain cases, and it is possible and conceivable that other motives

may have operated beside those of a judicial or administrative character. I can quite understand that both in 1864 and 1870 reasons of a political character may have indisposed the then Governments to press any demand on the United States as to which in their minds any doubt may have existed. I am not attacking what they did; but I contend that to waive a right on one occasion, or on two, is not to abandon it; that the opinions of the law officers of one Government, however deserving of respect, are not international documents; and that, as between the United States and England, nothing has passed which amounts to an abandonment of the claim which we put forth in this correspondence." (*Id.*, p. 281.)

Lord Derby here concedes — what is undoubtedly the fact — that the law officers of the Crown and the British Government in 1864 and 1870 took a view which is different from that adopted by another set of law officers and the British Government in 1876. He is entirely correct in saying that nothing ever passed between that Government and the United States committing the former to the view expressed in 1864 and 1870. Secretary Fish, in order to find it, had to go outside of the records of his own office. Not a syllable of correspondence, containing the view, had ever passed between the two Governments. The protest of the British Government as to the case of Burley was exactly in harmony with the theory maintained by Lord Derby in 1876; and as to the case of Caldwell there was no correspondence.

It is true, however, that the opinions of the law officers which were held in 1864 and 1870, but not communicated to the United States, were in 1876 rejected by the British Government; and Secretary Fish, in the Winslow correspondence, had whatever argumentative advantage could arise from this contrariety of opinions. This point he pressed. The fact itself admitted of no denial.

Lord Derby, and the Lord Chancellor of England, while treating the opinions of the former law officers courteously, maintained that they were not correct; and, for the purpose of establishing this proposition, they appealed to the nature and design of extradition, as set forth by European text writers, to the language used in the treaty of 1842, and to the legislation of both Governments for its execution. It is a noticeable feature of the correspondence that Secretary Fish nowhere attempts any reply to this argument.



As already remarked, his main effort consisted in the citation of adverse British precedents, which he did not analyze with a view to ascertain their exact character.

The precedents sought in the cases of Heilbronn, Von Aernam, Paxton, and Rosenbaum, the last three of which occurred in Canada, are not relevant, since they do not bear upon the direct point under discussion, which was not whether the prisoner could set up the treaty in his plea of defense, but whether the Government surrendering him could by the terms of the treaty claim that he should be tried only for the offense on which the surrender was grounded.

The precedents furnished by the cases of Burley and Caldwell, though they involve the action of the British Government, and contain the expression of an opinion different from that held in 1876, possess, as to that opinion, no international character whatever. The opinion was not communicated to the United States, and was not the basis of any action as between the two Governments. The United States had no diplomatic right to that opinion, since it was never the subject of diplomacy at all. Though inconsistent with the position taken in 1876, it had never assumed such a form of expression as to make it a diplomatic fact. And, moreover, it was qualified by the condition that the surrendered person must first have a *bona fide* trial for the crime in respect to which he was delivered up, before he could be put on trial for any "additional offense;" and this condition was excluded by the doctrine of Secretary Fish.

**7. The Vital Question at Issue.** — The vital question, however, was not whether all the public men of England had always held the same opinions on the subject of extradition, but whether the treaty of 1842 between the two Governments did, in virtue of an implication resulting from its express stipulations, sustain the doctrine that a person extradited under it could be tried *only* for the offense charged against him in the proceedings and which was the basis of the surrender. The position of Secretary Fish, in respect to this question, renders meaningless the provisions, found in all the extradition treaties of the United States, that relate to the crimes for which extradition may be had, to the necessity of specifically charging some one or more of these crimes,

and to the evidence which must be submitted to the delivering Government in proof of the same.

It is to be remembered that each Government assumes, as its starting point in making an extradition treaty, that every person within its jurisdiction and not violating its laws is entitled, as against all the world, to the *prima facie* right of undisturbed and protected asylum. Now, neither Government agrees to a withdrawal of this right in respect to any accused party, and neither agrees to place that party in the custody of the other, except upon specified conditions distinctly stated in the treaty, and for a purpose as distinctly stated in the proceedings required by the treaty; and hence it is simply monstrous to assume that these conditions and this purpose are operative only for securing the surrender, and absolutely of no effect the moment the surrender has been actually obtained. And yet this was the position of Secretary Fish.

**8. The Object of Extradition.** — Extradition is certainly not a proceeding for its own sake, but simply a means to an end; and that end is to give the receiving Government the opportunity to put the accused party on trial, and, if convicted, to punish him according to law. A trial for what?

The treaty answers this question, in a general manner, by naming the offenses for which, and for which only, extradition may be obtained at all. It further answers the question, in a specific and definite manner, by requiring that some one or more of these offenses shall be charged by the demanding Government, and then proved to the satisfaction of the Government asked to make the delivery, as indispensable conditions of the right to claim the person of the alleged fugitive on the charge and for the purpose set forth.

To ignore these limitations that lie in extradition as a means and that govern it as such, and regard them as of no consequence when the delivery has been made, is, upon the very face of the statement, a palpable perversion of the remedy itself. This being legitimate, then all the conditions and qualifications, found in extradition treaties, sink into absolute insignificance, and become the sheerest surplusage imaginable. The extradition treaties of the United States would not, upon this construction, be respectable, even as literary documents.

## CHAPTER XVI.

## THE ENGLISH EXTRADITION ACT.

**1. The Occasion of the Act.** — The English Extradition Act of 1870, of which frequent mention is made in the correspondence between Great Britain and the United States with reference to the case of Winslow, grew out of the investigations of a committee appointed by the House of Commons, and directed to examine the whole subject of extradition law and report any recommendations adapted to its improvement. The previous practice of Parliament had been to provide by special acts for the execution of extradition treaties. Five such acts were in existence.

In 1870 it was judged expedient to establish a comprehensive and general code on the subject, applicable to all the extradition treaties of the British Government, and designed to be corrective of evils which had been disclosed by the committee of the House of Commons. The preparation of this code was mainly the work of Sir Thomas Henry.

Lord Derby, in the Winslow correspondence, gives the following explanation of this law: "It is to be regarded as intended to prevent, for the future, evils that were pointed out by Mr. Hammond and others, as having occurred, and being liable to occur in private prosecutions to which the attention of the Government had not been called. Her Majesty's Government consider the provisions of the act as having been devised, not in the particular interest or for the particular ends of Great Britain, but as the embodiment of what was the general opinion of all countries on the subject of extradition, and as being beneficial to all and injurious to none. That the general opinion of European nations has justified this view is proved by the acceptance, by most of the leading nations of Europe, of extradition treaties based on its provisions." (*Foreign Relations of the United States*, 1876, p. 228.)

**2. Treaties based on the Act.** — Mr. Clarke, in an Appendix to his treatise on Extradition (2d ed.) gives the full text of

the extradition treaties of Great Britain, since 1870, with Germany, Belgium, Italy, Denmark, Austria, Sweden and Norway, and Brazil, every one of which expressly recognizes the principle that an extradited party is triable only for the crime or crimes in respect to which his surrender was made.

The seventh article of the treaty with Germany provides as follows: "A person surrendered can in no case be kept in prison or brought to trial in the State to which the surrender has been made for any crime or on account of any other matters than those for which the extradition shall have taken place. This stipulation does not apply to crimes committed after the extradition."

So, also, the sixth article of the treaty with Belgium provides thus: "When any person shall have been surrendered by either of the high contracting parties to the other, such person shall not, until he has been restored, or had an opportunity of returning to the country from whence he was surrendered, be triable or tried for any offense committed in the other country prior to the surrender, other than the particular offense on account of which he was surrendered."

Similar provisions are found in the other treaties contained in the Appendix of Mr. Clarke. The acceptance of this principle by these nations, in accordance with the English act of 1870, shows their understanding of the general doctrine of extradition. If the English doctrine on this subject had been repulsive to their views, they certainly would not have made treaties embodying it in express terms.

**3. Position of the British Government.**—A letter addressed by Sir E. Thornton to Secretary Fish, on the 22d of September, 1870, soon after the English act was passed, called the attention of the United States Government to its provisions. Mr. Fish made the letter an occasion for inquiring whether it would not be possible, in a new treaty, to provide "that, if during the trial of a person whose extradition had been asked for a crime, such as larceny, evidence previously unknown should appear that a prisoner had been guilty of a higher crime, such as murder, it should be legal to try him for the latter crime."

Sir E. Thornton was instructed to answer this question, and did answer it as follows: "That any provision in a treaty by which

the fugitive surrendered for one offense mentioned in the schedule may be tried for any offense committed prior to his extradition, other than the extradition crime for which he was surrendered, would be inadmissible." (Foreign Relations of the United States, 1876, p. 228.)

The "schedule" here referred to is a part of the act of 1870, containing a list of extradition crimes, including those in the then existing treaties of Great Britain, which must not be exceeded in the negotiation of other treaties. Parliament chose by law to make a list of such crimes, and thereby limit the treaty power.

The correspondence between Sir E. Thornton and Secretary Fish, immediately after the passage of the English act, and the subsequent correspondence between them in relation to a new treaty, show that the position taken by the British Government in regard to Winslow was not an idea extemporized for that occasion, and hitherto unknown to the United States. The course which the former, by a mistake, supposed that the latter meant to pursue with reference to Lawrence, raised the question in regard to Winslow whether, in the event of his surrender, a similar course might not be adopted in respect to him. A guaranty against such a course, as expressly provided for in the English act, and, as claimed by Lord Derby, virtually involved in the treaty of 1842, was hence required before making the delivery. Secretary Fish declined to give any guaranty as to the trial of Winslow; and thus the whole question, as to the construction of the treaty and the application of the English act thereto, was opened for diplomatic discussion.

This discussion was continued until the early part of July, 1876; and in the meantime the President, on the 20th of June, informed Congress that, if the British Government maintained its position, he should not, unless specially requested to do so by Congress, take any further "action either in making or granting requisitions for the surrender of fugitive criminals under the treaty of 1842."

On the 27th of the following October, Sir E. Thornton informed Secretary Fish that Her Majesty's Government had determined, "as a temporary measure until a new extradition treaty can be concluded," and without abandoning its construction of

the treaty of 1842, to recede from the demand of a formal guaranty in respect to the trial of an extradited person; and on the 22d of the next December, the President communicated this fact to Congress, and declared his purpose to regard the treaty as still operative, and in the future to make and grant requisitions for the surrender of fugitive criminals under it.

Thus the controversy came to an end, leaving the question in such a form that, although the Government of the United States is not required to give a positive pledge as to the trial of an extradited party, considerations of prudence and international courtesy clearly suggest that the British view on this subject should not be practically disregarded.

In the course of the discussion between the two Governments, three of the provisions of the English Extradition Act, and especially two of them, came under consideration; and these we now proceed to examine:

**4. The Provision as to Trial.** — The nineteenth section of the act contains one of these provisions, and reads as follows:

“Where, in pursuance of any arrangement with a foreign State, any person accused or convicted of any crime which, if committed in England, would be one of the crimes described in the first schedule to this act, is surrendered by that foreign State, such person shall not, until he has been restored or had an opportunity of returning to such foreign State, be triable or tried for any offense committed prior to the surrender in any part of Her Majesty's dominions, other than such of the said crimes as may be proved by the facts on which the surrender is grounded.”

The party in relation to whom this statute operates is represented as having been surrendered “in pursuance of any arrangement with a foreign State,” and as having been “accused or convicted of any crime which, if committed in England, would be one of the crimes described in the first schedule to this act.” This language distinctly designates the person to whom the statute refers.

The schedule provides that the crimes, therein mentioned, shall “be construed according to the law existing in England, or in any British possession (as the case may be), of the date of the alleged crime, whether by common law or by statute made before

or after the passage of this act." The theory of this provision is, that the law, as it was when the crime was committed, shall fix its character, and hence that no subsequent legislation, giving to the act a new and different character, shall be operative in that particular case.

Now, from the list of crimes triable under the special jurisdiction, secured by extradition, the statute excludes all offenses "committed prior to the surrender in any part of Her Majesty's dominions," and all offenses not "proved by the facts on which the surrender is grounded," until the extradited party "has been restored or had an opportunity of returning to said foreign State." This provides that, before he can be tried for any but the extradition crime or crimes, he must by the British Government have been restored to the country from which he was removed, or must have had an opportunity of returning thither by the withdrawal for a reasonable time of all restraint upon his liberty.

The implication is that, if being thus restored, the party chooses, of his own accord, to return to the jurisdiction of the British Government, or that if not being restored but having the opportunity of return to the foreign State from which he was removed, he chooses not to do so, but to remain under the jurisdiction acquired by the removal, then, in either case, he may be tried for an offense committed prior to the surrender, and not included in the terms thereof. The immunity against trial for any but the extradition charge is limited by these qualifications.

Moreover, if the party shall, after his surrender, commit a crime or crimes in any part of Her Majesty's dominions, either while in custody or after his discharge, then no immunity whatever, as to trial therefor, is secured to him. His case, upon this supposition, would be similar to that of any other offender.

The obvious design of the statute is to confine the jurisdiction gained by extradition to the specific purpose set forth in the proceedings when gaining it. The rule laid down to this end is that the triable crime, subject to the qualifications above stated, must be such "as may be proved by the facts on which the surrender is grounded." This assumes that these "facts," supported by the proper evidence, were submitted to the Government asked to make the delivery; that, in its judgment, they sufficiently established the commission of the crime or crimes for which the extra-

dition was sought, and that on this ground the delivery was made in pursuance of a treaty. The crime thus shown by the "facts" brought out in the extradition proceedings, is the only one for which the party can be put on trial under British authority, "until he has been restored or had an opportunity of returning to such foreign State," unless he shall commit some other crime after his extradition.

This does not preclude additional evidence, besides that on which he was surrendered, in proof of the crime when he is brought to trial; but it does preclude a trial for any other crime until one of the specified conditions of such trial shall be supplied, or the party, after extradition, shall have committed some other crime.

The British Government, by this part of the English act, concedes and means to concede to other Governments precisely what it expects and demands from them. There can be no pretense that the statute is in conflict with their rights, as growing out of extradition treaties. It simply limits the jurisdiction of British courts to the offense or offenses on the charge and proof of which extradition was claimed and granted, and thus protects the extradited party against any abuses of power by these courts. Such a case as that of Heilbronn, to which Secretary Fish referred, could not occur under this statute.

**5. Provision as to Surrender.** — A second provision, found in the second sub-section of the third section of the English Act, reads as follows :

"A fugitive criminal shall not be surrendered to a foreign State unless provision is made by the law of that State, or by arrangement, that the fugitive criminal shall not, until he has been restored or had an opportunity of returning to Her Majesty's dominions, be detained or tried in that foreign State, for any offense committed prior to his surrender, other than the extradition crime proved by the facts on which the surrender is grounded."

Lord Derby, in his letter to General Schenck, immediately after the demand for Winslow was made, referred to this statute, remarking that "the Secretary of State for the Home Department fears that the claim advanced by your Government to try Law-



rence in the recent case of extradition, with which you are familiar, for other crimes than the extradition crime for which he was surrendered, amounts to a denial that any such law [exempting him from such trial] exists in the United States," and further remarking that "the disclaimer of your Government of any implied understanding existing with Her Majesty's Government in this respect, and the interpretation put upon the act of Congress of August, 12, 1848, chapter 147, section 3, preclude any longer the belief in the existence of any effective arrangement which Her Majesty's Government had previously supposed to be practically in force." (*Foreign Relations of the United States*, 1876, p. 207.)

On this ground the surrender of Winslow was refused unless the requisite guaranty in respect to his trial was given. This was according to the English act of 1870, and as claimed by Lord Derby and denied by Secretary Fish in the subsequent correspondence, according to the spirit and intent of the treaty of 1842.

The practical end, sought by this clause of the English act, is to limit the jurisdiction over a fugitive criminal when surrendered by Great Britain to a foreign State to "the extradition crime proved by the facts on which the surrender is grounded." This description of the crime assumes that it comes within the enumeration of the treaty; that the foreign State has charged the crime upon a given person; that, as a basis for his surrender, proof of his guilt has been furnished; and that the British Government having examined the case, has judged the evidence sufficient to justify the surrender, in order that the party accused may, in the foreign State demanding him, be put on trial for the crime, and that only, which was proved by the facts on which the surrender was grounded. The theory of the provision is that this, and this only, is the crime for the trial of which the surrender was made, and hence that the jurisdiction granted thereby is limited to this purpose.

The method of gaining this end, as provided for in the clause, is to forbid the surrender of a fugitive criminal "to a foreign State unless provision is made by the law of that State, or by arrangement, that the fugitive criminal shall not, until he has been restored or had an opportunity of returning to Her Majesty's dominions, be detained or tried in that foreign State for any of-

fense committed prior to his surrender, other than the extradition crime proved by the facts on which the surrender is grounded." Parliament chose in this way to secure a guaranty beforehand, that the jurisdiction, given by surrender on the part of Great Britain, would be confined to the purpose for which it was given.

It is true that the treaty of 1842 between the two Governments does not, in express terms, contain any such provision in respect to the manner of its execution; yet if it implies that the jurisdiction acquired under it is to be limited to the purpose for which it was acquired, then the provision is consistent with the treaty.

The treaty limits the right of demand and the obligation of delivery to seven distinctly enumerated crimes, thereby implying that the jurisdiction secured under it is not to exceed this enumeration. The treaty still further provides that, in every case of actual delivery, the crime or crimes for which the surrender is demanded shall be definitely specified, just as clearly implying that the jurisdiction sought, if gained, has its limits in this specification. There is still further a provision that the delivery shall be made only when the charge is proved by evidence that would, according to the laws of the Government asked to make the surrender, be sufficient to justify the apprehension and commitment of the accused person for trial, if the offense charged had been committed under its jurisdiction; and this implies that the offense deemed proved by the delivering Government, and in respect to which the delivery was made, is the only one for which the party can be put on trial in virtue of the custody secured thereby.

There is no right of demand, and no obligation of delivery, in violation of the terms from which these implications arise. A special and limited jurisdiction over the extradited party is, by the terms and necessary implications of the treaty, the only jurisdiction that can be gained under it in respect to any crime or cause of detention that antedates his surrender; and this jurisdiction relates to the offense or offenses for which he was surrendered.

What we then find in this clause of the English act is an express statement, in the form of a legal statute for the government of British officers, of the implied doctrine of the treaty of 1842 in respect to the crime for which the party surrendered under the treaty may be tried. The act denies no right which the

treaty grants. It is not an attempt to supplement the treaty with provisions in contradiction of or inconsistent with its terms. It adds nothing to the treaty. It claims no authority or operation in or over the United States, or over any of the judicial or executive officers thereof. It simply asserts a British right under the treaty, and provides for securing it. There is no occasion for the United States to find fault with it, unless it is proposed to go beyond the treaty in dealing with an extradited person; and then the occasion for fault-finding would be with Great Britain.

The question as to *when* this treaty right shall be asserted, whether before delivery and as a condition thereof, or afterward in the form of a protest if there be an attempt to disregard it, is quite immaterial, so far as the right itself is concerned. If it exists at all, then its recognition may be made a condition of delivery, or it may be asserted by protest in the event of its violation. If Great Britain, under the treaty, has the right to protest against trial for any but the extradition offense, then it has an equal right to refuse a surrender without an adequate guaranty in this respect. The right of protest and the right of refusal rest on precisely the same principle. No Government, in the execution of a treaty, is bound to consent in advance to what would be a violation of it, or omit such legislation as will secure its own rights involved in the treaty. It has the right to insist upon its own rights; and this we understand to be the purpose of the English Act in relation to the detention and trial of persons who, as fugitive criminals, may, by the British Government, be surrendered to foreign States.

**6. Substitution for other Acts.**—A third provision of the English Act, contained in its twenty-seventh section, reads as follows:

“The acts specified in the third schedule to this act are hereby repealed as to the whole of Her Majesty’s dominions; and this act (with the exception of any thing contained in it which is inconsistent with the treaties referred to in the acts so repealed) shall apply (as regards crimes committed either before or after the passing of this act), in the case of the foreign States with which those treaties are made, in the same manner as if an Order in Council referring to such treaties had been made in pursuance of this act, and as if such Order had directed that every law and

ordinance which is in force in any British possession with respect to such treaties should have effect as part of this act: Provided that if any proceedings for or in relation to the surrender of a fugitive criminal have been commenced under the said acts previously to the repeal thereof, such proceedings may be completed, and the fugitive surrendered, in the same manner as if this act had not been passed."

There are four provisions in this section. The first is a repeal of the acts named in the third schedule to the act of 1870. The second is the application of this act to the extradition treaties referred to in the acts repealed. The third is an exception in this application as to any thing in the act inconsistent with those treaties. The fourth is the permission, where extradition proceedings have been commenced in any case, that they should be completed "in the same manner as if this act had not been passed."

The acts named in the schedule are five, and the treaties referred to in them are those with the United States, France and Denmark.

Secretary Fish claimed that the treaty of 1842 with the United States, as to the matter under discussion between the two Governments, comes within the exception specified in this section of the act of 1870, because, as to that matter, the act is inconsistent with the treaty, and, hence, that in this respect it has no application to the treaty. Lord Derby, on the other hand, denied these propositions, and insisted that the English act of 1870 and the treaty of 1842 are not in conflict with each other, that the express doctrine of the act in regard to the trial of extradited criminals is implied in the treaty, and, hence, that on this subject, which was the only point in controversy between them, there is nothing in the act to except the treaty from its application.

It would be unreasonable to suppose that the British Parliament, consciously and by intention, passed an act for the execution of extradition treaties, which it deemed in any particular inconsistent with these treaties, and at the same time adopted an exception in general terms to avoid a result for which it had deliberately provided, or that it meant to repeal or change the treaties when professing to legislate for their execution. The exception as to the application of the act is evidently a general

provision of caution for the purpose of being sure not to legislate in contradiction of existing treaties, and not a confession on the part of Parliament that it had so legislated in respect to any treaty. The exception is stated with no specific mention of any treaty, or of any provision in any treaty.

To assume that Parliament designed, as to the matter in debate, to except the treaty of 1842 with the United States from the full operation of the act, is a palpable begging of the whole question that was at issue in the Winslow controversy. Such, certainly, was not its intention unless, as to that matter, the two are inconsistent. If it be true that, as to the offense for which a surrendered criminal may be tried, the treaty implies what the act expressly declares, then there is no inconsistency between them on this point, and, hence, no reason why the act should not in this respect apply to the treaty. The guaranty which the one requires simply secures beforehand the immunity which the other implies. Lord Derby, as we think, correctly claimed that the treaty and the act are identical in this respect.

Indeed, the special act passed by Parliament soon after the treaty was negotiated, and the act of Congress of August 12, 1848, and also the supplementary act passed by Congress in 1869, clearly imply the doctrine which the English act of 1870 expressly asserts. In the first two of these acts provision is made for the delivery of a fugitive criminal, in order that he may "be tried for the crime of which such person shall be so accused." Both acts, in precisely the same words, specify such a trial as the end or object of the delivery. So, also, the act of 1869 describes the trial contemplated by the delivery, as having reference to "the crimes or offenses specified in the warrant of extradition."

This legislation implies a construction of the treaty which the English act of 1870 puts into express and positive terms. It names the offense for which the trial is to be had, as being the one of which the person has been accused, or as the one "specified in the warrant of extradition." It does not give the remotest hint of any other trial, and, hence, by what it says and by what it does not say, implies that the party is to be tried only for the crime "proved by the facts on which the surrender is grounded," which is the express doctrine of the English act of 1870.

Judge Benedict, in *The United States v. Lawrence* (13 Blatch. 295), after remarking that "the British act of 1870" has no authority as a law in the United States, proceeded to say: "It would appear that the English courts incline to the opinion that the act of 1870 has no effect in England, even to limit the operation of the treaty of 1842," which, as he held in that case, allows the trial of an extradited person, for any offense, whether it is or is not the one for which the surrender was made. As a proof of this statement, he quotes the following words of the Lord Chief Justice of the Queen's Bench in *Ex parte Bouvier*: "I see plainly what was the intention of the legislature—that is to say, it was intended, while getting rid of the statutes by which the treaties were confirmed, to save the existing treaties in their full integrity and force."

The case of Bouvier, who was demanded by the French Government in 1872, arose under the treaty of Great Britain with France, and had no relation to that of 1842 with the United States. The important question, as Mr. Clarke observes in his treatise on Extradition (2d ed., p. 149), came before the Court of the Queen's Bench, "whether the effect of the Extradition Act of 1870 had not been to render the treaty with France entirely inoperative." The relation of the act to the treaty of 1842 with the United States was not under consideration at all, and no opinion was expressed as to whether it did or did not in England "limit the operation of the treaty of 1842."

So far, moreover, as the opinion that was expressed had any thing to do with the effect of the English act in England, Judge Benedict was entirely mistaken as to its character. Bouvier was before the court on a writ of *habeas corpus*; and it was urged by his counsel that he should be discharged, because, as was alleged, there was no law in France to prevent "his trial for an offense other than that for which the rendition was demanded." The counsel for the Crown, in reply to this position, presented the affidavit of M. Adolphe Moreau, the officially appointed counsel to the French embassy in London, to the effect that "it is a principle of French and international law, that the individual whose extradition has been granted can only be prosecuted and tried for the very crime for which his extradition has been obtained." This affidavit, says Mr. Clarke, "was accepted by the court as decisive

of the question ;” and accordingly the court “remanded the prisoner to custody, holding that provision was made by the French law that he should be tried only for the offense for which extradition was asked.” (Clarke on Extradition, 2d ed., pp. 149–152.)

The remanding of Bouvier to custody was on the assurance by an affidavit, which the court accepted as “decisive of the question,” that under the law of France he would be tried only for the offense for which his extradition had been obtained. This is exactly the doctrine of the English act of 1870, and the facts clearly show that the court treated the act as operative in England with reference to the treaty with France.

It deserves to be noted also that the words of the Lord Chief Justice, as quoted by Judge Benedict, have nothing to do with the specific question whether the English act of 1870 and the treaty of 1842 are consistent with each other, and hence nothing to do with the question whether the act has effect or not in England with reference to that treaty. What he says is that Parliament, by the exception as to any thing in the act inconsistent with the treaties referred to, intended “to save existing treaties in their full integrity and force.” There is no doubt of this; yet it does not follow that he regarded “the treaty of 1842” as coming within the exception because inconsistent with the act of 1870, and hence regarded the act as having “no effect in England” in respect to that treaty. On this point he expressed no opinion. For aught that appears in the words quoted, he may have agreed with Lord Derby as to the construction of “the treaty of 1842,” and as to the entire consistency of the English act of 1870 with it. Supposing the two to be consistent, then, of course, the act would not limit the operation of the treaty in England, or anywhere else, not because the latter is excepted from the application of the former, but because there is no inconsistency between them.

Judge Benedict, however, assuming an inconsistency, sought on this ground to exclude the treaty from the application of the act as to the question which he was discussing, and thereby retain the treaty in full force with *his* understanding of its operation, supporting his opinion by quoting the words of the Lord Chief Justice in the case of Bouvier, which, as we have seen, neither contain the opinion nor hold any relation to it whatever. The

Judge was certainly very unfortunate in the case which he cited, as well as in the words which he quoted.

**7. Three other Provisions.** — There are three other provisions, all of them found in the third section of the English act, which, though not involved in the Winslow controversy, deserve a brief mention, since they operate as restrictions upon the surrender of fugitive criminals. The first declares that “a fugitive criminal shall not be surrendered if the offense in respect of which his surrender is demanded is one of a political character, or if he prove to the satisfaction of the police magistrate or the court before whom he is brought on *habeas corpus*, or to the Secretary of State, that the requisition for his surrender has in fact been made with a view to try or punish him for an offense of a political character.” The design of this provision is to guard against any surrender for what are called political offenses, which, though not always expressly excluded in extradition treaties, are, nevertheless, according to the settled policy of Great Britain and most of the nations of Europe, regarded as non-extraditable.

The second provision declares that “a fugitive criminal who has been accused of some offense within English jurisdiction, not being the offense for which his surrender is asked, or is undergoing sentence under any conviction in the United Kingdom, shall not be surrendered until after he has been discharged, whether by acquittal or on expiration of his sentence or otherwise.” This simply postpones the delivery in the cases specified until the purposes of English jurisdiction shall have been completed.

The third provision declares that “a fugitive criminal shall not be surrendered until the expiration of fifteen days from the date of his being committed to prison to await his surrender.” This, in the eleventh section of the act, is supplemented by a requirement that the committing magistrate “shall inform such criminal that he will not be surrendered until after the expiration of fifteen days, and that he has a right to apply for a writ of *habeas corpus*.” The object of these provisions is to secure to the person accused a reasonable opportunity to have the legality of the proceedings tested before a court prior to his actual surrender, and to be discharged from imprisonment in the event that the proceedings shall be held to be illegal. The protection thus af-



forded is meant to be remedial as against any hasty or improper action on the part of the Government.

The other provisions of the English act call for no comment since they relate to matters of purely domestic procedure, and involve no international questions in respect to the construction and application of British extradition treaties.

## CHAPTER XVII.

## EXTRADITION TO THE UNITED STATES.

The direct object of an extradition treaty between two nations is to secure to each of the parties the right to demand the surrender of a fugitive criminal upon the terms and for the purpose specified in the treaty, and, consequently, to establish a corresponding obligation to make the surrender. Sovereign nations have the right to deliver up such fugitives to each other without any treaty stipulations to this effect; yet the right of positive demand, implying the obligation of delivery, results only from a treaty.

Moreover, where a treaty has been made, giving the right and creating the obligation, it is to be assumed that the treaty was intended to cover all the cases in which, and to embrace all the conditions and terms upon which, the respective parties will either make a demand or grant a surrender. They enter into the compact for this purpose, and exhaust the purpose in the compact. The compact is the whole law for their government on the subject.

It follows, as a necessary result, that all extradition proceedings under the treaties of the United States, and the laws enacted for their execution, must be in pursuance of, and conformity with, these treaties and laws. The treaties and laws furnish the basis of the proceedings, and are hence the test of their validity and regularity. The design of such proceedings is to secure the surrender of an alleged fugitive from justice, that he may be tried, and, if convicted, punished by the Government, whose laws he has violated.

This supposes the action of two Governments — one of them making the demand under a treaty, and the other delivering up the fugitive in compliance therewith. The proceedings hence arrange themselves into two general classes. The first embraces those that relate to the demand for a fugitive criminal; and the second, those that relate to his surrender.

The design of the present chapter will be to state the general principles of extradition procedure, under the extradition treaties

and laws of the United States, when the extradition is to the United States. The demand for the fugitive criminal, in this case, is made by the Government of the United States; and the delivery is made, if made at all, by a foreign Government under the stipulations of a treaty.

**1. The Requisition.**—The General Government, by its requisition, makes the demand, and undertakes to supply the necessary treaty conditions for obtaining the delivery of a fugitive criminal from a foreign Government. The agreement between it and that Government is to the effect that the latter will comply with the requisition or demand when these conditions, as provided for in the treaty, are presented.

Whether the stipulated conditions are present, in any given case of a demand by the United States, is a question of fact; and, upon this question, the Government asked to make the delivery is the final judge. The Court of Appeals of Kentucky, in *The Commonwealth v. Hawes*, 13 Bush, 697, said, in regard to the tenth article of the treaty of 1842 with Great Britain:

“By providing the terms and conditions upon which a warrant for the arrest of the alleged fugitive may be issued, and confining the duty of making the surrender to cases in which the evidence of criminality is sufficient, according to the laws of the place where such fugitive is found, to justify his commitment for trial, the right of the demanding Government to decide finally as to the propriety of the demand, and as to the evidences of guilt, is as plainly excluded as if that right had been denied by express language.”

The same remark applies with equal pertinency and force to every extradition treaty of the United States. Plainly, the demanding Government cannot authoritatively decide upon the duty of the Government asked to make the delivery; and should the latter, in its judgment, violate the treaty by refusing to comply with the demand, then the remedy of the former would be to abrogate the treaty altogether, or take such other measures as are sanctioned by the law of nations.

**2. Demand by the Supreme Political Authority.**—The general principle in respect to international extradition, stated by

Attorney-General Cushing in the case of *Maria Theresa Gerk*, 7 Op. Att.-Gen. 6, is that all demands must emanate from the supreme political authority of the demanding state. (Ortelan, *Le Ministère Public en France*, tom. 2<sup>de</sup>. p. 231; Foucart, *Droit Pub.* s. 211.)

This authority in the United States, as to all intercourse with foreign nations, is by the Constitution vested in the President; and hence any requisition upon a foreign Government for the delivery of a fugitive criminal to the United States must, in the absence of a stipulation otherwise, be made by the President, usually acting through the Secretary of State, or by a foreign minister, or other agent specially authorized by him to make it. Some of the treaties of the United States contain special provisions on this point.

The second article of the extradition treaty with Mexico reads as follows: "In the case of crimes committed in the frontier States or Territories of the two contracting parties, requisitions may be made through their respective diplomatic agents, or through the chief civil authority of said States or Territories, or through such chief civil or judicial authority of the districts or counties bordering on the frontier as may for this purpose be duly authorized by the said chief civil authority of the said frontier States or Territories, or when, from any cause, the civil authority of such State or Territory shall be suspended, through the chief military officer in command of such State or Territory." The fourth article of the same treaty provides that in the cases specified in the second article, the same local authorities may deliver up fugitive criminals.

So, also, in the extradition treaties with the Republic of Salvador, Ecuador, the Ottoman Empire and Spain, it is provided that requisitions may be made by the diplomatic agents of the respective Governments, or, in their absence from the country or its seat of Government, by superior consular officers. Such provisions create exceptions to the general doctrine that the demand must come from the supreme political authority of the demanding state.

**3. Form of the Demand.**—The Hon. William M. Evarts, when Secretary of State, in a letter addressed to the author respecting the form of a requisition or demand made by the United States, wrote as follows:

"The second paper asked by you follows no fixed phraseology. If the fugitive is ascertained to be in a foreign country with which the United States have a treaty specifying as extraditable the crime charged to have been committed by him, an instruction is sent to the diplomatic officer in that country, reciting that information of a trustworthy character has been received that the person named has committed a specified crime in a certain city, town or county, and is now a fugitive from justice in the country addressed, and directing the diplomatic officer to request his extradition from the foreign country, and delivery to the authorized agent of the United States, who is specified by name, so soon as the necessary formalities under the treaty between the two countries shall have been complied with. In his turn, the diplomatic officer addresses the foreign officer of the Government to which he is accredited."

"In the special case of a fugitive in the Dominion of Canada, the diplomatic request for extradition is addressed directly to the British Minister at this Capital, who in turn corresponds with the Governor-General of the Dominion."

**4. The Necessary Conditions.**—A mere requisition by the President, or by his authority, is, however, not sufficient to establish the obligation of delivery. It must always be supplemented by compliance with the following conditions:

(1.) The crime for which the delivery is asked must be one of the offenses enumerated in the treaty under which the requisition is made.

(2.) This crime must be specifically charged as having been committed by the party accused within the jurisdiction of the United States.

(3.) The accused party, properly designated in the charge, must be alleged to have sought asylum, or to be found, within the jurisdiction of the Government on which the demand is made.

(4.) The charge, in the form that will be recognized by the foreign Government, must state the crime with such particularity and detail as will enable that Government to judge of its nature, and determine whether it comes within the list of crimes specified in the treaty.

(5.) The documentary evidence, duly authenticated, or other evidence, submitted in proof of the charge, must be such as, according to the laws of the country on which the demand is made,

would justify the apprehension of the accused person and his commitment for trial, if the crime had been there committed.

These conditions result from the stipulations of the extradition treaties of the United States, and hence belong to the process of presenting and enforcing the demand and securing the delivery of a fugitive criminal. When present, they make the delivery an obligation.

Mr. Moak, in his *English Reports*, vol. 6, p. 138, appends an instructive note, giving the form of the papers prepared by himself for the purpose of procuring the extradition of a fugitive criminal from Canada, under the tenth article of the treaty of 1842 with Great Britain. These papers were the following :

(1.) His own affidavit as district attorney of the county of Albany in the State of New York, setting forth the fact that one Emil Lowenstein had in said county, and by the acts recited as to time and place, feloniously caused the death of one John D. Weston. This affidavit was made before and attested by a police justice and justice of the peace in the county of Albany.

(2.) The depositions of several witnesses who appeared before the justice and swore to the facts in the case.

(3.) The warrant issued by the justice for the arrest of the party accused.

(4.) The certificate of the justice as to the warrant issued by him, and the depositions made before him on which the warrant was issued.

(5.) The certificate of the county clerk of Albany showing that the said justice making the certificate was at the time a justice of the peace and a police justice in the city of Albany.

(6.) The certificate of the Governor of the State of New York, through the Secretary of State, declaring that the person making the preceding certificate as county clerk was the clerk of the county of Albany, and authorized by law to make the same.

(7.) The complaint of a United States police detective before a judge in Canada, charging the said Lowenstein with the murder, and alleging his escape to Canada, and also that he was then within the province of Ontario.

The object of these papers and of the complaint made before the Canadian judge was to take the proper steps, in accordance with the laws of Canada, to procure there a judicial cognizance of

the case, with a view to the arrest of the accused party, and upon adequate proof of his guilt by the depositions presented, his commitment to prison, that, upon due requisition on the part of the United States, he might be subsequently delivered up by the proper executive authority. On the basis of the papers and the complaint the Canadian judge issued the preliminary warrant of arrest, and after an examination of the accused, committed him to prison, commanding the keeper of the jail there to detain him until he should be delivered up by the Governor-General, or discharged according to law. The whole proceeding was shaped so as to make it effective for the result in accordance with the laws of Canada.

Mr. Moak, in his note, remarks that "a certified copy of an indictment found is not of the slightest value and would be worthless in Canada. The Canadian statute recognizes only a *complaint*, an examination thereunder, and a warrant issued upon such complaint and depositions."

The procedure, in every demand made or to be made by the United States, seeks to bring the case within the treaty and within the operation of the laws of the foreign Government for its execution. This is the point to be gained in actually procuring extradition. Hence the necessity of adapting the procedure to the laws of the country on which the demand is made.

The English Extradition Act of 1870, for example, provides the magistrates who may take cognizance of extradition cases, issue warrants of arrest, and conduct preliminary examinations, and also designates the evidence admissible in the hearing of such cases, and further authorizes the commitment of the accused party to prison for delivery in the event that the examining magistrate shall deem the evidence sufficient. Now, in inaugurating extradition proceedings in this country for the purpose of procuring extradition under this act, the steps to be taken must be such as will be effective according to the terms of this act. The British authorities will, of course, apply their own law, and hence the procedure must adjust itself to that law. The same is true in every country.

Some of the extradition treaties of the United States contain specific provisions which, whenever they exist, must be complied with in procuring extradition under them. The treaty with the Ottoman Empire requires that, when the fugitive is a convict, the

demand for his delivery shall be accompanied by a copy of the sentence of the court in which he was convicted, authenticated in the manner prescribed, and that when he is simply charged with crime, "a duly authenticated copy of the warrant for his arrest in the country where the crime may have been committed, or of the depositions upon which such warrant may have been issued, must accompany the requisition."

The treaty with Spain contains a similar provision, with the exception that a duly authenticated copy of both the warrant of arrest and the depositions upon which it was issued, must be produced, "with such other evidence or proof as may be deemed competent in the case."

The treaty with Peru provides that "the extradition will be granted in virtue of the demand made by the one Government on the other, with the remission of a condemnatory sentence, an order of arrest, or of any process equivalent to such an order, in which will be specified the character and gravity of the imputed acts, and the dispositions of the penal laws relative to the case;" and further provides that "the documents accompanying the demand for extradition shall be originals or certified copies, legally authorized by the tribunals or by a competent person," with the addition that, "if possible there shall be remitted at the same time a descriptive list of the individual required or any other proof toward his identity."

These are examples of special provisions relating to the procedure for extradition; and, of course, they must be complied with in presenting the case to a foreign Government. Such provisions are not found in all the extradition treaties of the United States; but wherever they are found, they are rules in making the demand, and hence rules as to the obligation of delivery. The particular treaty applicable to the case, in each case of attempted extradition, should be carefully studied, in order to ascertain precisely what must be done to make the demand effective.

**5. The Receiving Agent and the Expense.** — No Government undertakes to transport the fugitive criminal from its own dominions to the country demanding him, or to pay the expenses incidental to the arrest, detention and delivery of such criminal. The United States, when demanding a criminal, must hence ap-



point an agent to receive and bring him into this country, and also provide for paying the expenses of the extradition.

The appointment of such agent is an act of the President, by whom the agent is commissioned for this special service. The following is the form of the commission :

*President of the United States of America. To            :*

Whereas, it appears by information in due form by me received, that            , charged with the crime of            , fugitive from the justice of the United States,            ;

And whereas, application has been made for the extradition of said fugitive in compliance with existing treaty stipulations between the United States of America and            ;

And whereas, information has been received that, in compliance with such application, the necessary warrant is ready to be issued by the authorities aforesaid, for the delivery of the above-named fugitive into the custody of such person or persons as may be duly authorized to receive the said fugitive and bring            back to the United States for trial ;

Now, therefore, you are hereby authorized and empowered, in virtue of the stipulations aforesaid, and in execution thereof, to receive the said            as aforesaid, and to take and hold            in your custody, and conduct            from such place of delivery,            by the most direct and convenient means of transportation, to and into the United States, there to surrender the said            to the proper authorities of the

For all which these presents shall be your sufficient warrant.

In testimony whereof, I have hereunto signed my name and caused the seal of the United States to be affixed.

Done at the City of Washington, this            day of            , A. D. 18            , and of the Independence of the United States the            .

By the President.

*Secretary of State.*

Armed with, and authorized by, this commission, the agent repairs to the foreign country, and receives the criminal in the name of the United States, and, bringing him back to this country as a prisoner, delivers him to the proper authorities.

Section 5276 of the Revised Statutes of the United States provides as follows in respect to the powers of this agent :

“ Any person duly appointed to receive, in behalf of the United States, the delivery, by a foreign Government, of any person accused of crime committed within the jurisdiction of the United States, and to convey him to the place of his trial, shall have all the powers of a Marshal of the United States, in the several districts through which it may be necessary for him to pass with such prisoner, so far as such power is requisite for the prisoner's safe-keeping.”

Section 5277 of the same Statutes provides the following penalty for any unlawful interference with this agent in the discharge of his duties :

“ Every person who knowingly and willfully obstructs, resists, or opposes such agent in the execution of his duties, or who rescues or attempts to rescue such prisoner, whether in the custody of the agent or person to whom his custody has lawfully been committed, shall be punishable by a fine of not more than one thousand dollars, and by imprisonment for not more than one year.”

**6. The Application to the President.** — The proceedings, as thus detailed, are taken by the President, not *sua sponte*, of his own motion, but only upon a proper application for this purpose. A case is presented for executive consideration ; and then whether the President shall make a demand for the delivery of the alleged fugitive, or cause it to be made by his authority, is a question for his discretion to determine. Upon this point he is the sole judge.

The State Department, under the authority of the President, has adopted the following instructions in relation to applications for the extradition of fugitive criminals :

*First.* When an extradition is sought for an offense of which the State courts have jurisdiction, the request must come from the Governor of the State. When sought for an offense against the United States, the application should be made through the Attorney-General, or the proper Executive Department. All requests for the institution of proceedings for extradition should be addressed to the Secretary of State, and forwarded to the Department of State, accompanied by the necessary papers, as herein stated, and furnishing the full name of the person proposed for designation by the President, to receive and convey the prisoner to the United States.

*Second.* The existing treaty provisions between the United States and foreign powers, in reference to extradition, provide that the surrender shall only be made upon such evidence of criminality as, according to the laws of the place where the fugitive, or person so charged, shall be found, would justify his or her apprehension and commitment for trial if the crime had been there committed.

The evidence required to be used in the preliminary examination in the foreign State is as follows :

(1.) If the fugitive has been convicted and escaped thereafter, a transcript of the record of conviction and judgment, duly certified under the seal of the court, with the personal certificate of the judge of the court as to its genuineness, and authenticated under the Great Seal of the State where the conviction was had, or under the seal of the proper Federal court.

(2.) If no trial has been had, and an indictment has been found, a copy of the indictment, together with a copy of the depositions adduced before the grand jury and upon which the indictment was found, with a copy of bench warrant, if any has issued, and the return thereto, certified and authenticated as above prescribed.

(3.) If no indictment has been found, but an information has been made and a warrant of arrest issued, a copy of such information, together with a copy of all written depositions or evidence upon which such warrant of arrest issued, a copy of the warrant with any return that may have been made thereto; all of which should be certified by the magistrate or judicial officer who issued the warrant; and if a justice of the peace, or officer having no seal, his official character should be properly certified, and the whole authenticated as above provided.

If the extradition of the fugitive is sought for several offenses, copies of the several convictions, indictments or informations, certified and authenticated as hereinbefore directed, should be forwarded, and the request for extradition should name the several offenses.

All the papers herein enumerated should be transmitted in duplicate, one copy being required for the files of the Department, and the other, duly authenticated by the Secretary of State, will be returned with the President's warrant, for the use of the agent who may be designated to receive the fugitive.

*Thirdly.* By the practice of some of the countries with which the United States have treaties, to entitle copies of depositions to be received in evidence, the party producing them is required to attest, under oath, that they are true copies of the original depositions, and it is, therefore, desirable that such agent, either from

a comparison of the copies with the originals, or from having been present at the attestations of the copies, should be prepared to make such declaration. When the original depositions are forwarded, such declaration is not required.

A strict compliance with these formal requirements may save to the parties seeking the extradition of the fugitive criminal much delay and expense.

Mr. Moak, in the note above referred to, states the following rules of practice as having been adopted by the General Government in demanding fugitives from justice under the extradition treaty of 1842 with Great Britain :

(1.) It must appear to the President "that one of the offenses enumerated in the treaty has been committed within the jurisdiction of the United States, or some one of the States or Territories."

(2.) It must further appear to him "that the person charged with the offense has fled from the United States and taken refuge in the British Dominions."

(3.) "Upon the presentment of evidence of these facts, a requisition will be made requesting the delivery of the person charged, provided that such evidence of criminality be exhibited before the British authorities, as according to the laws of the place where the person charged shall be found, would justify his apprehension and commitment for trial, if a like crime or offense had there been committed. The regular and most proper evidence of the guilt of the fugitive would be a properly certified copy of an indictment found against him by a grand jury, or of an information made before an examining magistrate accompanied by one or more depositions setting forth as fully as possible the circumstances of the crime."

(4.) "If the fugitive be charged with the violation of a law of a State or Territory, his delivery will be required to be made to the authorities of such State or Territory."

(5.) "If the offense charged be a violation of a law of the United States (such as piracy, murder on board vessels of the United States, or in arsenals, dock yards, etc.), the delivery will be required to be made to the officers or authorities of the United States."

(6.) "The expense of the apprehension and delivery" must be "borne by the party applying for the requisition of the Government, except in cases of crimes against the United States."

(7.) "The name of the person who is to receive and bring back the offender is required for insertion in the warrant authorizing him to act."

**7. Protection of the Fugitive.**—Section 5275 of the Revised Statutes of the United States contains the following provision in relation to the safe-keeping and protection of the fugitive criminal, after his delivery :

"Whenever any person is delivered by any foreign Government to an agent of the United States for the purpose of being brought within the United States and tried for any crime of which he is duly accused, the President shall have power to take all necessary measures for the transportation and safe-keeping of such accused person, and for his security against lawless violence, until the final conclusion of his trial for the crimes or offenses specified in the warrant of extradition, and until his final discharge from custody or imprisonment for, or on account of, such crimes or offenses, and for a reasonable time thereafter, and may employ such portion of the land or naval forces of the United States, or of the militia thereof, as may be necessary for the safe-keeping and protection of the accused."

This statute, originally enacted by Congress in 1869, takes up the case at the point of the delivery of the fugitive criminal, and then provides in the President the authority for his transportation to this country, his safe-keeping and protection against lawless violence, until the terminus of the case in his discharge from custody or imprisonment for the crimes or offenses "specified in the warrant of extradition," "and for a reasonable time thereafter."

This "warrant" was issued by the Government that made the delivery ; and the assumption of the statute is that it would state the crime or crimes, on the charge and proof of which the delivery was made, and further, that the party being delivered would be tried only "for the crimes or offenses specified in the warrant."

Congress, in enacting the law, clearly had no idea of any other trial under the custody thus acquired, than that relating to the

crimes designated in the extradition warrant. The law in its phraseology is constructed upon the theory that the custody is to be used for this single purpose, and not to be extended to a trial for offenses not charged nor proved in the proceedings, and not "specified in the warrant of extradition." The fact that the President is authorized to protect the fugitive against lawless violence until the conclusion of his trial, and until his discharge from custody or imprisonment, and "for a reasonable time thereafter," shows that Congress regarded the case as a *special* one not falling into the ordinary category of persons arrested, tried and punished for crime.

No such provision would have been made if the whole case, after the delivery, were simply one of municipal law, and had no relation to a custody granted by a foreign Government under a treaty, and involved no obligation in respect to the use thereof. The theory of the legislation is that the United States, in obtaining the extradition of a fugitive criminal, acquire no more power over his person than that which results from the treaty.

**8. Remedy by Habeas Corpus.** — The Revised Statutes of the United States, in sections 751 and 752, give to the Federal courts, and the several justices of these courts, the power to issue writs of *habeas corpus*, for the purpose of inquiring into "the cause of restraint of liberty."

Section 753 of the same Statutes specifies the cases in which such writs may be issued by these courts or judges, one of which is where the party applying for the writ "is in custody in violation of the Constitution or of a law or treaty of the United States." The fact of the existence of such custody, whether by the order of a Federal or a State court, makes a case, under this provision, for the issue of a writ of *habeas corpus*, in order to furnish the necessary relief to the prisoner.

If then, as remarked in a previous chapter, a person, extradited to the United States under the provisions of a treaty, be held in custody in violation of that treaty, he would clearly have the right to apply to a Federal court or judge for a writ of *habeas corpus*; and if, upon the hearing of the case, the court or judge should be of the opinion that his imprisonment violates any provision of the treaty, whether express or implied, under which he

was delivered up to the United States, it would be the duty of such court or judge to order his discharge from the unlawful custody. The law giving the *habeas corpus* power is broad enough to cover such a case.

A treaty of the United States may thus be made operative in respect to fugitive criminals who have been surrendered to the United States, and being charged with offenses against State authority, and delivered up to that authority, are, by it, dealt with in a way that violates the treaty. Federal judges, through the writ of *habeas corpus*, are competent to supply the corrective remedy in such a case.

**9. Duty on Acquittal.** — The London Law *Journal*, vol. 13, p. 215, in an article on extradition, expresses the opinion that where a party has been extradited, and has, upon trial, been acquitted of the crime with which he was charged, "the State which obtained his extradition in error ought to be responsible for the person having the means of returning to the place from whence he was taken." There is no provision to this effect in any treaty or law of the United States. Governments usually make no compensation by way of redress to accused but acquitted parties for the injuries they may have received from being thus accused.

And yet the opinion of this *Journal* clearly has justice and right in its favor. The acquittal of the accused party is a legal confession on the part of the Government procuring his extradition, that he was innocent of the charge brought against him. He has been severely a sufferer by a mistake thus confessed; and the very least that the Government committing the mistake can in equity do, would be to replace him, at its own expense, within the jurisdiction from which it had removed him, provided he so desires.

A provision to this effect would be an improvement to the extradition law of the United States, and, indeed, of any country in which it does not already exist. It would be no disfigurement if found in an extradition treaty. The simple justice of the idea is a sufficient commendation.

## CHAPTER XVIII.

## EXTRADITION FROM THE UNITED STATES.

The procedure in this form of extradition relates to the delivery of a fugitive criminal, by the United States to a foreign Government, under the stipulations of a treaty. The Government making the demand presents the case; and if it comes within the provisions of the treaty with that Government, then the obligation of delivery is imperative. Whether this is a fact or not will be determined by the proper authorities of the United States.

The legal functions to be performed are in part *executive*, belonging to the President of the United States and to executive officers acting under his authority, and subject to his control, and in part *judicial*, being assigned to specified magistrates of the law.

## SECTION I.

## EXECUTIVE FUNCTIONS.

**1. The Executive Mandate.**—The President of the United States, upon having a requisition addressed to him, by a foreign Government, under the stipulations of a treaty, for the arrest and delivery of a fugitive criminal; and upon reasonable cause in the premises being shown, may, if he shall judge it expedient, issue a preliminary mandate or certificate, under the hand of the Secretary of State and the seal of the State Department, for the purpose of moving “to action the proper judicial authorities of the country, in order to the arrest and lawful examination of the party charged with crimes, and the investigation thereof for the information of the Government.” (*The case of Calder*, 6 Op. Att.-Gen. 91, 92.)

Such a mandate, issued by the Secretary of State, under his hand and the seal of his Department, is in legal effect issued by the President himself. In foreign relations, and executive acts imposed by treaty stipulations, the President acts through the



Now, therefore, to the end that the above-named officers, or any of them, may cause the necessary proceedings to be had, in pursuance of said laws, in order that the evidence of the criminality of the said \_\_\_\_\_ may be heard and considered, and, if deemed sufficient to sustain the charge, that the same may be certified, together with a copy of all the proceedings, to the Secretary of State, that a warrant may issue for \_\_\_\_\_ surrender pursuant to said \_\_\_\_\_, I certify the facts above recited.

In testimony whereof, I have hereunto signed my name and caused the seal of the Department of State to be affixed.

Done at the city of Washington, this       day of       , A. D. 187       , and of the Independence of the United States the

*Secretary of State.*

This upon its face is not a warrant to arrest the party accused. It is addressed to any of the specified classes of judicial officers, who are authorized by the laws of Congress to issue warrants of arrest, upon complaint made under oath. It is an official certificate from the State Department of the Government to the facts which it recites, and informs the judicial officer to whom it may be presented, that a requisition under a treaty of the United States has been made by a foreign Government for the delivery of the party or parties accused, and implies that, in the judgment of the President, the judicial proceedings provided for by law should be instituted, with a view to an examination into the evidence of criminality, and, if the evidence be deemed sufficient, to the commitment of the party or parties accused, to await the executive order of surrender.

**3. Necessity of the Executive Mandate.**—The question whether such a mandate from the President is absolutely necessary to the commencement of judicial proceedings in extradition cases, was, in 1852, considered by the Supreme Court of the United States, in the case of *Thomas Kaine* (14 How. 103).

Kane had, without the issuing of such a mandate, been arrested as a fugitive from justice by the warrant of a Commissioner of the United States; and, after his examination, he was committed to prison by the Commissioner, to await the order of the President for his delivery. Judge Betts, before whom the prisoner was brought on *habeas corpus*, held that, although no instruction or request in regard to the case had been received from the executive branch of the Government, the arrest and commitment by the Commissioner were lawful, and remanded the prisoner to custody. (10 N. Y. Leg. Obs. 257.)

Mr. Justice Nelson, of the Supreme Court of the United States, and presiding judge of the Circuit Court for the Second Circuit, afterward issued another writ of *habeas corpus* in the same case, claiming that the second writ was not barred by the

action under the first writ, and reserved the hearing of the case to be had before the Supreme Court.

The question, as to the necessity of the President's mandate, in order to authorize judicial officers to act in such cases, was fully argued before the Supreme Court; and the only point that was authoritatively settled was that the court had no jurisdiction over the matter submitted. Messrs. Justices Catron, Wayne, McLean and Grier, however, concurred in the opinion that the mandate of the President was not necessary to the jurisdiction of the Commissioner by whom Kaine was originally examined and committed, and that the magistrates named in the first section of the Act of August 12, 1848 (9 U. S. Stat. at Large, 302), have the power to issue warrants of arrest at the instance of a foreign Government, and, after examination, to commit the person accused upon proper evidence of his guilt, without waiting for any request or mandate from the Executive Department of the Government.

Chief Justice Taney and Messrs. Justices Nelson and Daniel, on the other hand, were of opinion that these magistrates have no jurisdiction in such cases until a formal demand has been made by a foreign Government, and they have been authorized by the President's mandate to entertain proceedings for the apprehension and examination, and, upon proper evidence of guilt, the committal of the alleged fugitive. Mr. Justice Curtis, while expressing no opinion on this point, thought that the court had no jurisdiction over the case; and this is the only question that was authoritatively decided.

The matter being left in this form, Mr. Justice Nelson subsequently, at chambers, proceeded to consider the case, and finally discharged the prisoner, though a warrant for his delivery had been issued by the State Department. The discharge was placed on the grounds stated by him when the case was before the Supreme Court, one of which was "that the judiciary possesses no jurisdiction to entertain the proceedings under the treaty for the apprehension and committal of the alleged fugitive, without a previous requisition made under the authority of Great Britain upon the President of the United States, and his authority obtained for the purpose." (*Ex parte Kaine*, 3 Blatch. 1.)

This decision having been made by the presiding judge of the Circuit Court for the Second Circuit, Judge Shipman, in *In re*

*Henrich*, 5 Blatch. 414, laid down the same doctrine as one of the rules to be observed in extradition proceedings. So, also, Judge Blatchford, in *In re Farez*, 7 Blatch. 34, affirmed the doctrine as the law of the court, referring to the two previous authorities in its support. Judge Woodruff, in *In re Macdonnall*, 11 Blatch. 79, in 1873, when Mr. Justice Nelson had resigned his office as one of the justices of the Supreme Court, and had therefore ceased to be the presiding judge of the Circuit Court for the Second Circuit, stated the doctrine as it had been previously held in that court, without the expression of a positive opinion as to its correctness. His language, however, clearly implied doubt as to the soundness of the view originally taken in that court by Mr. Justice Nelson.

Judge Blatchford in 1874, in *In re Thomas*, 12 Blatch. 370, subjected the doctrine to a careful examination, and came to a conclusion which he expressed as follows:

“Without recapitulating the grounds taken in the various opinions referred to, as reasons for holding that a prior mandate is not made a prerequisite, by any act of Congress, to the issuing, by a magistrate, of a warrant for the arrest of a fugitive whose extradition is sought, and is not such a prerequisite, except where made so by the treaty, I am prepared to say that, so far as my own action is concerned, it is not for the purposes of the present case, or of future like cases (that is, cases where the treaty does not require a previous mandate), to be regarded as the law that the issuing of the Executive mandate, in a case of extradition, is a prerequisite to the entertaining of proceedings, and the issuing of a warrant of arrest by a magistrate. I am further authorized to say that I have consulted with the Circuit Judge (Judge Woodruff) on the subject, and submitted these views to him, and he concurs in them, as an expression also of his own views.”

Judge Nelson, District Judge of the United States for the District of Minnesota, in *Ex parte Van Hoven* (4 Dill. 411), said that “the judicial arm of the Government is powerless to arrest any alleged fugitive from justice whose extradition is demanded by a foreign Government under any treaty of the United States, without a requisition previously made by the foreign Government upon the United States and its authority obtained to apprehend such fugitive.” This affirms the doctrine of Mr. Justice Nelson in the case of *Kaine*.

On the other hand, Judge Lowell, now Circuit Judge in the First Circuit, declined, in the case of *In re Kelley* (9 Amer. Law Rev. 167), to adopt the practice of requiring a previous executive mandate. He said in this case: "Considering the strong reasons, as well as the great preponderance of authority against the practice—a preponderance which I find in the treaty itself, in the statute, and in the opinions of the greater number of the judges who have considered the question—and further, that the reasons in its favor have lost their force in the present state of practice in the State Department, I feel constrained to refuse to establish it in this district."

So, also, in *In re Dugan* (2 Lowell, 367), Judge Lowell said:

"The Judge has nothing to do with the question whether the foreign country has duly authorized an application for the extradition to be made. The law is that, when a complaint is made on oath, the Judge is to examine the evidence of criminality, and if he deems it sufficient to sustain the charge, shall certify the same to the Secretary of State, that a warrant may issue upon the requisition of the proper authorities of the foreign Governments. The requisition is to be made to the executive department, and, in the natural order of things, would be made *after* the evidence is taken and certified. If the authorities of the foreign Government should find, on the examination of the evidence, that it does not make out a case which they choose to press, they will make no requisition. And the statute gives them two months in which to complete their action upon the matter."

In *Ex parte Ross* (2 Bond, 252), the court held that no authority is required from the executive department of the United States to enable a Judge, Magistrate or Commissioner to issue a warrant for the arrest of an alleged fugitive from justice under the treaty of 1842 with Great Britain. So, also, Attorney-General Cushing, in the *Case of Calder* (6 Op. Att.-Gen. 91), expressed the opinion that any foreign Government, entitled by treaty to the extradition of a fugitive from justice, may apply to the courts for his arrest in the first instance.

Judge Brown, in *Castro v. De Uriarte* (16 Fed. Rep. 93), held that "a preliminary mandate from the Executive is not essential to jurisdiction in such proceedings, unless made obligatory by the treaty." He also held that the eleventh article of the treaty with Spain, which was the treaty involved in the case, did not estab-

lish such an obligation, and hence that the warrant of arrest was not void because no preliminary mandate had been obtained from the Executive authorizing the extradition proceedings.

There is a manifest conflict of opinion on the part of these authorities; yet the preponderance of authority and the better view would seem to be that the Executive mandate is not necessary, as a condition precedent to the power of the magistrates, named in the law, to issue a warrant of arrest and conduct an examination in an extradition case. There is nothing in any treaty of the United States which forbids the President to issue his mandate, if requested to do so, or if he thinks it expedient; yet unless in a case in which a treaty thus specifically provides, the mandate is not necessary, in order to confer jurisdiction upon magistrates otherwise qualified to entertain extradition proceedings.

The law of Congress says that any one of these magistrates may, "upon complaint made under oath, charging any person," etc., "issue his warrant for the apprehension of the person so charged," and, when he is brought before him, proceed to examine the evidence of the alleged criminality. This confers a direct and positive power upon these magistrates to do the things specified, and contains no provision making the exercise of the power dependent upon a previous mandate issued by the President. There is, indeed, no provision, in the law itself, relating to such a mandate. The mandate has its basis in the practice of the Executive Department of the Government, and not in the law of Congress.

It was held, in *ex parte Van Hoven*, 4 Dill. 415, that it need not appear by a distinct recital in the mandate of the Secretary of State to the judicial officers of the Government, that a warrant for the arrest of an alleged fugitive, for the crime imputed to him, had been issued in Belgium. The judicial department will presume from the mandate of the Secretary of State that this was done.

It was also held, in *In re Macdonnell*, 11 Blatch. 79, that it is not necessary that the complaint on which the warrant of arrest is issued, should set forth the issuing of a mandate by the Executive for the arrest of the fugitive, and that if such mandate is a necessary prerequisite, it is sufficient for it to describe the offense charged in the terms of the treaty.

**4. Executive Warrant of Arrest.** — Some of the extradition treaties of the United States expressly provide that, after the requisition has been duly made, the President may issue a warrant for the arrest of the accused party. The sixth article of the treaty with the Republic of Salvador says: "The President of the United States or the President of Salvador may then issue a warrant for the apprehension of the fugitive, in order that he may be brought before the proper judicial authority for examination."

The fifth article of the treaty with Ecuador says: "The President of the United States, or the proper executive authority of Ecuador, may then order the arrest of the fugitive, in order that he may be brought before the judicial authority which is competent to examine the question of extradition."

The fifth article of the treaty with the Ottoman Empire says: "The President of the United States or the proper executive authority in Turkey may then issue a warrant for the apprehension of the fugitive, in order that he may be brought before the proper judicial authority for examination."

The seventh article of the treaty of June 13, 1882, with Belgium, says: The President of the United States, or the proper executive authority in Belgium, may then issue a warrant for the apprehension of the fugitive, in order that he may be brought before the proper judicial authority for examination."

These are examples in which treaties, in the cases and in the circumstances specified, directly empower the President of the United States to issue warrants for the arrest of the accused parties; and since treaties are laws of the United States, he may, if he shall judge it expedient, exercise the power. The practice of the Presidents of the United States is not directly to issue such warrants, but rather to issue executive mandates or certificates to judicial magistrates, leaving the issue of warrants of actual arrest to these magistrates as provided for by the law of Congress.

There is no inconsistency between these treaty provisions and the law of Congress. The former give to the President a power which the law of Congress does not give, without superseding the power given by law to the specified magistrates. The language of the provisions is that the President "may" issue his warrant of arrest for the purpose named. He "may" also omit to do so

when the law provides another and sufficient mode for securing the arrest of the accused party.

**5. Surrender of the Fugitive.** — Nearly all the extradition treaties of the United States, either expressly or by obvious implication, provide that the surrender of fugitive criminals shall be made by the executive authority of the respective Governments. This, on the part of the United States, is done by the President through a warrant issued under the hand of the Secretary of State directed to the marshal or other person having the prisoner in custody, and commanding him to make the delivery to the agent of the foreign Government authorized to receive him.

The special authority, given by law for this delivery, is found in section 5272 of the Revised Statutes of the United States, which reads as follows :

“It shall be lawful for the Secretary of State, under his hand and seal of office, to order the person so committed to be delivered to such person as shall be authorized, in the name and on the behalf of such foreign Government, to be tried for the crime of which such person shall be so accused, and such person shall be delivered up accordingly ; and it shall be lawful for the person so authorized to hold such person in custody, and to take him to the territory of such foreign Government, pursuant to such treaty. If the person so accused shall escape out of the custody to which he shall be committed, or to which he shall be delivered, it shall be lawful to retake such person in the same manner as any person accused of any crime against the laws in force in that part of the United States to which he shall escape, may be retaken on an escape.”

The authority for delivery, as here given, relates to “the person so committed.” This person is the party who has been arrested, whose case has been judicially examined, and who, upon the evidence as presented on such examination, has been committed to prison, to await the action of the Executive Department of the Government.

The form of the warrant for the surrender of the party is the following :



DEPARTMENT OF STATE, }

*To all to whom these presents shall come, greeting :*

Whereas, , accredited to this Government, has made requisition in conformity with the provisions of the , for the mutual delivery of criminals, fugitives from justice in certain cases, for the delivery up of , charged with the crime of , committed within the jurisdiction of

And whereas, the said been found within the jurisdiction of the United States, and , by proper authority and due form of law, been brought before for examination upon said charge of ;

And whereas, the said has found and adjudged that the evidence produced against the said is sufficient in law to justify commitment upon the said charge, and has, therefore, ordered that the said be committed pursuant to the provisions of said ;

Now, therefore, pursuant to the provisions of section 5272 of the Revised Statutes of the United States, these presents are to require the United States Marshal for the , or any other public officer or person having charge or custody of the aforesaid , to surrender and deliver up to , who been authorized in the name and on behalf of to receive , or to any other person or persons who may in like manner be authorized in the name or on behalf of to receive the said to be tried for the crime of which so accused.

In testimony whereof, I have hereunto signed my name and caused the seal of the Department of State to be affixed.

Done at the City of Washington, this day of , A. D. 18 , and of the Independence of the United States the

*Secretary of State.*

The fourth article of the extradition treaty of 1861, with Mexico, provides that, "in the case of crimes committed within the limits of the frontier States or Territories" of the respective Governments, "the surrender may be made by the chief civil authority thereof, or such chief civil or judicial authority of the districts or counties bordering on the frontier as may for this purpose be duly authorized by the said chief civil authority of the said frontier States or Territories, or if, from any cause, the civil

authority of such State or Territory shall be suspended, then such surrender may be made by the chief military officer in command of such State or Territory." This creates an exception, in the case specified, as to the method of the delivery.

Attorney-General Black, in *Tyler's Case*, 9 Op. Att.-Gen. 379, took the ground that the act of Congress, providing for the surrender of fugitive criminals, neither requires nor authorizes such surrender by the Executive Department of the Government "until the facts of the case are judicially ascertained and certified" to the Secretary of State.

This is undoubtedly the correct view of the law. Provision is made by law, as will be shown in the sequel, for a preliminary judicial examination of the case, and, if the evidence be deemed sufficient by the examining magistrate, for the certification of the testimony before him to the Secretary of State; and, until this examination has been had and the testimony certified and transmitted to the State Department, the law gives no authority for the issue of a warrant of surrender.

**6. The Discretion of the President.** — The preliminary judicial examination, though a necessary proceeding, does not exclude or control the exercise of the President's discretion in the premises. He may or may not make the surrender, according to his own judgment of the case, when all the testimony has been transmitted for examination. The judgment of the examining magistrate does not necessarily bind his judgment. It simply supplies an aid and a condition for its exercise.

Judge Blatchford, in *In re Stupp*, 11 Blatch. 124, in a proceeding on *habeas corpus*, refused to discharge the prisoner, and remanded him to the custody of the marshal. The President, however, having referred the question involved in the case to the Attorney-General of the United States, who gave an opinion in direct conflict with that of Judge Blatchford, declined to make the delivery, adopting the opinion of the Attorney-General, who regarded the case as not coming within the provisions of the extradition treaty with Prussia. (14 Op. Att.-Gen. 281.)

Judge Blatchford, in *In re Stupp*, 12 Blatch. 507, held that after a commitment of the accused for surrender, and even after his discharge on *habeas corpus* has been refused, the President

may lawfully decline to surrender him, either on the ground that the case is not within the treaty, or that the evidence is not sufficient to establish the charge of criminality, and that the statute does not give any right of appeal or review on the merits, to be exercised by any court or judicial officer.

Judge Ingersoll, in *The Matter of Heilbronn*, 12 N. Y. Leg. Obs. 65, referring to the case of a party committed for surrender, said: "In such a case no one can revise the opinion of the Commissioner but the President. If he should be of opinion that the evidence taken before the Commissioner on the hearing was not sufficient to sustain the charge, then it would be his duty to withhold the warrant of extradition. If it should be his opinion that it was sufficient, then it would be his duty to grant such warrant."

On this question the President, after the judicial examination has been made, and the party committed to await his action, is the sole and final judge as to the duty of delivery.

**7. Limitation of Time.**—Section 5273 of the Revised Statutes of the United States provides as follows:

"Whenever any person who is committed under this Title or any treaty, to remain until delivered up in pursuance of a requisition, is not so delivered up and conveyed out of the United States within two calendar months after such commitment, over and above the time actually required to convey the prisoner from the jail to which he was committed, by the readiest way, out of the United States, it shall be lawful for any judge of the United States, or of any State, upon application made to him by or on behalf of the prisoner so committed, and upon proof made to him that reasonable notice of the intention to make such application has been given to the Secretary of State, to order the person so committed to be discharged out of custody, unless sufficient cause is shown to such judge why such discharge ought not to be ordered."

This fixes a limit within which the executive power of surrender must be exercised, if at all. The party cannot be indefinitely retained in custody.

The party being thus discharged, the warrant for extradition cannot be used for the purpose of his re-arrest. If a new arrest of the same party is to be made, it must be upon another proceeding before a judicial officer, as provided for by law. The extra-

dition warrant of the President is simply a warrant of surrender, and not a warrant for a new arrest.

The case of *Vance*, who was discharged from custody after the extradition warrant had been issued, in consequence of the failure of the agent of the foreign Government to appear, presented the question whether that warrant could be used for his re-arrest. Attorney-General Stanbery answered this question in the negative, saying that the warrant "is in no sense a warrant for arrest, and cannot be used for the purpose of arrest," and that "if a new arrest is made, it must be upon another proceeding before a judicial officer or Commissioner." (12 Op. Att.-Gen. 75.)

**8. Relief by Habeas Corpus.**—The President's warrant for extradition, though not directly reviewable by appeal to any court, nevertheless does not preclude the right of a competent court, within whose jurisdiction the party may be found, to issue a writ of *habeas corpus* for the purpose of a judicial inquiry into the proceedings, and, if they shall be found illegal, to discharge the prisoner from custody. Section 753 of the Revised Statutes of the United States gives the *habeas corpus* power to the courts of the United States, and to the several Justices and Judges thereof, in any case in which a person "is in custody under or by color of the authority of the United States." This clearly comprehends the case in which the party applying for the writ, is in the custody of the agent of a foreign Government under an extradition warrant issued by the President, so long as the party remains within the territorial jurisdiction of the United States.

Mr. Justice Nelson exercised this power in the case of *Kaine*, after the extradition warrant had been issued by the State Department, and holding the custody to be illegal, he ordered the prisoner to be discharged. (*Ex parte Kaine*, 3 Blatch. 1.) Judge Edmonds, in *The Matter of Metzger*, 1 Barb. 248, did the same thing.

The English Extradition Act of 1870 provides that "a fugitive criminal shall not be surrendered until the expiration of fifteen days from the date of his being committed to prison to await his surrender," and that the police magistrate who commits him to prison shall inform him "that he will not be surrendered until after the expiration of fifteen days, and that he has a right to apply for a writ of *habeas corpus*." This rule is adopted in the interests

of liberty, and for the protection of the alleged fugitive from justice against improper extradition. A similar rule should be adopted in this country.

## SECTION II.

### JUDICIAL FUNCTIONS.

The judicial functions, connected with the procedure of extradition from the United States, are designed to be auxiliary to those of the Executive Department of the Government. The provisions of law relating to these functions will be presented in the following order : —

**1. The Examining Magistrates.**— Section 5270 of the Revised Statutes of the United States provides that “ whenever there is a treaty or convention for extradition between the Government of the United States and any foreign Government, any Justice of the Supreme Court, circuit Judge, district Judge, Commissioner authorized so to do by any of the courts of the United States, or Judge of a court of record of general jurisdiction of any State, may ” take cognizance of any specific case as set forth in the statute, and exercise the powers therein bestowed.

The Judges here specified are directly empowered to act in such cases ; and the same power is given to Commissioners of the United States, with the qualification that they must be authorized so to act by some court of the United States. All these officers are alike and equally examining magistrates, and, for the purposes had in view, are clothed with precisely the same authority. On this point Judge Johnson, in *In re Vandervelpen*, 14 Blatch. 137, remarked : “ For the purposes of this law, each of the enumerated officers possesses the same authority, so that it is indifferent, for all legal purposes, whether he is the Chief Justice of the Supreme Court of the United States, or only a Commissioner authorized to act by any of the courts of the United States. Each of them derives his power not from his official station, but from the delegation of power conferred by this act.”

The Commissioners, referred to in the statute, are Commissioners of Circuit Courts, derive their appointment from these courts, and exercise such powers as are or may be expressly conferred on them

by law. (Rev. Stat. of U. S. sec. 627.) These Commissioners have no authority to act in extradition cases simply by reason of their appointment as such. They must receive this special authority from some court of the United States; and if they have not received it, then they have no jurisdiction in this class of cases.

Judge Blatchford, in *In re Farez*, 7 Blatch. 34, held that a warrant issued by a United States Commissioner, for the apprehension of a fugitive charged with crime, with a view to his being delivered up to a foreign Government, under a treaty of extradition, is void unless it shows on its face that the Commissioner issuing it was authorized by a court of the United States to issue it. He said in this case that such authority is "a jurisdictional fact, and should be set forth on the face of the warrant."

Judge Blatchford also held, in *In re Farez*, 7 Blatch. 345, that it is not necessary that a warrant of arrest issued by a Commissioner should show on its face that he was authorized to issue that particular warrant, and that it is sufficient if it shows that he was authorized by a court of the United States to issue warrants in cases of extradition, embracing the case covered by such warrant. (*The Case of Christiana Cochrane*, 4 Op. Att.-Gen. 201.)

In *Ex parte Lane*, 6 Fed. Rep. 34, it was held by Judge Brown, of the District Court of the United States for the Eastern District of Michigan, that a complaint and warrant in an extradition case should show upon their face that the Commissioner issuing the warrant is duly empowered to act in cases of that description, and that the Commissioner has no power to amend the complaint or warrant, or to supply defects by his certificate, after the case is closed and a writ of *certiorari* is served upon him to produce the record of his proceedings.

**2. The Complaint.** — Section 5270 of the Revised Statutes of the United States further provides that any of the judicial officers named "may, upon complaint made under oath, charging any person found within the limits of any State, district, or Territory, with having committed within the jurisdiction of such foreign Government any of the crimes provided for by such treaty or convention, issue his warrant for the apprehension of the person so charged."

A "complaint" must be made before any of these officers can take cognizance of the case, and it must be made under oath. This complaint must allege a crime within the enumeration of the treaty applicable to the case, and charge the commission of such crime within the jurisdiction of the foreign Government with which the treaty was made. The party against whom the complaint is made, and whose arrest is sought on the basis thereof, is "any person" who, being thus charged, is "found within the limits of any State, district or Territory" of the United States. These facts are jurisdictional, and they must be set forth in the complaint.

The charge of crime must be made with such perspicuity and recitals of fact as will give to the complaint a legal character, and enable the magistrate to see that a *prima facie* case of the crime alleged is presented. Judge Shipman, in *In re Henrich*, 5 Blatch. 414, said: "A complaint upon which a warrant of arrest is asked, should set forth clearly, but briefly, the substance of the offense charged, so that the court can see that one or more of the particular crimes enumerated in the treaty is alleged to have been committed. This complaint need not be drawn with the formal precision and nicety of an indictment for final trial, but should set forth the substantial and material features of the offense."

Judge Blatchford, in *In re Farez*, 7 Blatch. 34, 48, said: "The complaint in this case contains nothing more than a general charge of forgery, without any sufficient specification of time and place, or of the nature of the forgery, or of the forged instrument or document. \* \* \* \* This is, under any system of criminal jurisprudence, a defective complaint. \* \* \* \* No citizen of the United States could be arrested and held upon a complaint so vague and general in its specifications, or, rather, so utterly devoid of specifications as the complaint in this case; and it certainly never could have been intended, by the treaty-making power, that an alleged fugitive should be arrested upon a complaint less specific than such as would be required in the case of an offense committed in the United States."

Judge Nelson, in *Ex parte Van Hoven*, 4 Dill. 411, held that where a complaint charges the crime of forgery as having been committed on a certain day in the jurisdiction of a foreign Gov-

ernment, in that one "wilfully, etc., uttered and put in circulation forged or counterfeit papers, or obligations, or other titles or instruments of credits," without specifying the kind of obligations forged, or the character of the papers, or nature of the titles, etc., it is defective at common law, and does not fairly inform the accused of the charge, and does not show probable cause for arrest. The Judge discharged Van Hoven from the arrest on the ground of a defective complaint.

Judge Lowell, in *In re Dugan*, 2 Lowell, 267, held that where there is an application, sustained by complaint on oath, it is not for the judge to consider whether or not a foreign Government has authorized the application. He has only to examine the evidence of criminality, and if he deems it sufficient to sustain the charge, to certify the same to the Secretary of State. He also held, in *In re Kelley*, 2 Lowell, 339, that a judge of the United States has authority to issue his warrant for the arrest of a supposed criminal, under the extradition treaty with Great Britain, and the statutes passed to aid in carrying that and similar treaties into effect, when due complaint is made to him, without a previous application having been made to the President.

Judge Dillon, in *Ex parte Van Hoven*, 4 Dill. 415, held that a complaint, under oath, made by the Consul-General of Belgium, before a proper Commissioner of the Southern District of New York, upon the strength of telegrams and depositions taken in Belgium, is sufficient to justify the court in remanding the prisoner for examination by the Commissioner before whom the complaint was made, and who issued the warrant of arrest.

It was held by Judge Blatchford, in *In re Farez*, 7 Blatch. 345, that a complaint before a Commissioner, in an extradition case, verified by the Consul of a foreign Government, in which he charges the offense properly, is sufficient if made by him officially, although he does not make the averments on his personal knowledge of the facts. It was also held in this case that it is not a necessary preliminary to an investigation, under an extradition treaty, to show that a warrant was issued abroad against the offender, and hence that the complaint need not state that fact, if it exists. Such a statement is not indispensable to a valid complaint.



Judge Brown, of the District Court of the United States for the Southern District of New York, held, in *In re Roth*, 15 Fed. Rep. 505, that, in extradition proceedings, the complaint is sufficient from which it clearly appears that a treaty offense is meant to be charged, and that "it is not essential to extradition that there should have been any previous criminal proceedings instituted there as a prerequisite to the institution of extradition proceedings here."

In *Ex parte Lane*, 6 Fed. Rep. 34, it was held by Judge Brown, of the District Court of the United States for the Eastern District of Michigan, that a complaint made simply upon information and belief is fatally defective, and gives the Commissioner no jurisdiction. It was further held that if the person making the complaint has no personal knowledge of the facts, it should appear that he is the representative of the foreign Government, acting in an official capacity, or he should produce an indictment against the party charged, or depositions tending to show his guilt, or at least set forth with particularity the source and details of his information, that it may appear that the arrest of the party is sought upon something more than a rumor or suspicion of guilt.

The law of Congress says nothing about the person who shall be deemed qualified to make the complaint, and ask for the warrant of arrest against the accused party. Ordinarily, this will be done by some official representative or agent of the foreign Government. The statute, however, does not prescribe any such rule. It simply says that, "upon complaint made under oath," charging the crime, the magistrate may issue his warrant of arrest. Nor does the statute make a requisition from a foreign Government or the issue of a warrant of arrest abroad, an indispensable antecedent of the complaint.

**3. The Warrant of Arrest.** — The warrant of arrest is the direct authority for arresting and holding the accused party, and as such it has its basis, in part, in the facts set forth in the complaint, and in part, in the law authorizing the issue of the warrant. Its recitals must make a sufficient exhibit of both, and if the warrant be issued by a Commissioner, then it must show on its face that he has been authorized by some court of the United States

to issue such warrants. (*In re Farez*, 6 Blatch. 34.) The legality of the warrant will be tested by what appears on its face.

Judge Woodruff, replying, in *In re Macdonnell*, 11 Blatch. 79, 87, to the objection that the warrant did not sufficiently describe the offense, said:

“The warrant, in the fullest manner, meets every possible requirement of the law. It shows, on its face, every fact which is even here claimed to be requisite to the jurisdiction of the officers, that such jurisdiction has been regularly and formally invoked, for the arrest of the alleged fugitive, and it declares, in terms, the special authority upon which the proceeding is based, to-wit, the treaty, the Act of Congress, and the appointment of the officer to execute the law. It declares the demand of the foreign Government, the mandate of our own, and the offense charged. The description of the offense might, in my opinion, for all purposes of insertion in the warrant of arrest, have followed the words of the treaty. The reference to the treaty and the Act passed to carry it into effect, identifies the charge with the treaty itself, and makes a charge of the offense of forgery import, *per se*, a charge of the offense of forgery mentioned in the treaty. That is all that is essential to jurisdiction of the subject-matter. It is not necessary that the particulars required to be proved, in order to establish the offense mentioned in the treaty, should be specified in the warrant; nor is it any part of the province of the warrant to disclose the details, in order that the prisoner may be notified of those details.”

In *Castro v. De Uriarte*, 16 Fed. Rep. 93, it was held that, “in a warrant of arrest in extradition proceedings, the offense or accusation need be described in general terms only, such as are used in the statute or treaty.” “The warrant,” said Judge Brown, “must state the accusation, offense, or crime; but it is sufficient to state it by its statutory designation without further particulars.” (*Payne v. Barnes*, 5 Barb. 465; *Atchinson v. Spencer*, 9 Wend. 62; and *The People v. Donohue*, 84 N. Y. 438.) The warrant, if showing on its face all the jurisdictional facts upon which the authority to issue it depends, is sufficient in its recitals. This warrant is addressed to the marshals or deputy marshals of the United States, or to any of them in any district, designating the person to be arrested, and directing the officer making the arrest to bring the party before the magistrate issuing

the warrant at a certain time and place, or some other competent magistrate specified.

It was held by Judge Shipman, in *In re Henrich*, 5 Blatch. 414, that, under a warrant issued by a Justice of the Supreme Court, directed to the marshals of the United States for any district respectively, and to their deputies, or the deputies of any of them, or to any of said deputies, commanding them, and each of them, to arrest the alleged fugitive for surrender, and bring him before the said Justice, or a Commissioner named therein, or some other magistrate, at New York, a deputy marshal of the United States for the Southern District of New York has the right to arrest such person in Wisconsin, and bring him before such Commissioner, and such Commissioner has jurisdiction of the case under such arrest.

The principle here stated is not limited to the case in which the warrant of arrest is issued by a Justice of the Supreme Court of the United States. The warrant runs throughout the United States, by whatever authorized magistrate it may be issued, and may be executed by any marshal or deputy marshal in any district of the United States in which the fugitive shall be found. Judge Shipman held that the restriction in the twenty-seventh section of the Judiciary Act of 1789 (1 U. S. Stat. at Large, 73), has no application to an arrest under an extradition treaty, and that the marshal or deputy marshal, authorized by the warrant, might arrest the alleged fugitive in whatever district he might find him within the United States.

It was held by Judge Blatchford, in *In re Farez*, 7 Blatch. 34, that where a writ of *habeas corpus* is served on a marshal, commanding him to produce before the court the body of a person in his custody, such person is in the custody of the court, under such writ, from the time it is served on the marshal, and the marshal cannot lawfully arrest such person on a warrant, as a fugitive, in an extradition proceeding, until the proceedings on the writ of *habeas corpus* are terminated. It appeared in this case that two warrants of arrest had been issued, and that the second warrant of arrest had been issued after the writ of *habeas corpus* had been served on the marshal in respect to the custody under the first warrant. Judge Blatchford held that the arrest under

the second warrant was illegal, because the alleged fugitive was then in the custody of the court.

**4. Hearing the Evidence.**—Section 5270 of the Revised Statutes of the United States further provides that the party arrested, upon the complaint, shall “be brought before such Justice, Judge, or Commissioner, to the end that the evidence of criminality may be heard and considered.” This hearing is by the Justice, Judge, or Commissioner, as the case may be, and the object of it is to ascertain judicially, whether, under the treaty and the law, there is adequate cause for the detention of the accused, with a view to his delivery to a foreign Government, by the Executive Department of the Government. The hearing is not a trial of the question of guilt or innocence, except for this single purpose. (*In re Wage*, 15 Fed. Rep. 864.)

The means of determining the point at issue must be supplied by evidence; and if this evidence fails to show that, under the treaty applicable to the case, the arrested party ought to be detained for delivery by the proper authority, he is entitled to be discharged from the arrest. The evidence consists in oral testimony given under oath before the magistrate who conducts the examination, or in authenticated documents rendered admissible as evidence by law, or in both.

(1) *Oral Testimony.*—The general principle in application to oral testimony is, that there is no difference between the process of taking it and that of taking such testimony in any preliminary investigation with a view to ascertain whether a person arrested should be dismissed or held for the action of a grand jury. The testimony is taken in open court by questions and answers. The party seeking the extradition and the accused party have alike the right to introduce and examine witnesses for the purpose of settling the question at issue.

Judge Shipman, in *In re Henrich*, 5 Blatch. 414, said: “The Commissioner before whom an alleged fugitive is brought for hearing should keep a record of all the oral evidence taken before him, taken in the narrative form and not by question and answer, together with the objections made to the admissibility of any portion of it, or to any part of the documentary evidence, briefly

stating the grounds of such objections, but he should exclude from the record the arguments and disputes of counsel."

Judge Blatchford, in *In re Farez*, 7 Blatch. 345, held that on an investigation before a Commissioner, sitting in the State of New York, in which State an accused party is entitled to testify in his own behalf, the alleged offender, arrested under the treaty with the Swiss Confederation had a right to be examined as a witness in his own behalf. He also held in this case that the complaint before the Commissioner being made by a foreign Consul, and showing that he has no personal knowledge of the matters stated in it, the alleged offender cannot claim the right to cross-examine the Consul, on the investigation before the Commissioner, before the prosecution gives any evidence under the complaint.

Judge Lowell, on the other hand, in *In re Dugan*, 2 Lowell, 367, held that "the testimony of the accused is not admissible in a case of extradition, tried by a judge of the United States, though he is sitting in a State where such evidence would be received." The better view on this subject is that stated by Judge Blatchford.

It was held by Judge Woodruff, in *In re Macdonnell*, 11 Blatch. 79, that, in extradition cases, the Commissioner may, in his discretion, grant reasonable adjournments, in the course of the hearing of evidence, to enable testimony to be produced. The Judge said in this case: "It will also be found, that the practice of granting reasonable adjournments has obtained heretofore in extradition cases; and there is no reason, either of favor to the accused, jealousy of the foreign Government, or otherwise, why it should not prevail in those cases as well as in cases of crime alleged to have been committed in violation of our own laws."

Judge Blatchford, in *In re Farez*, 7 Blatch. 345, sustained the action of the Commissioner in refusing to allow an adjournment, to enable the prisoner to procure testimony from Switzerland, on the ground, as remarked by the Judge, that "the affidavits do not show that there is any evidence, either oral or documentary, on the part of the prisoner, that exists or is accessible or is likely to be obtained." He added: "No magistrate would, on such affidavits, have been justified in granting the motion" for an adjournment of the proceeding.

The parties, on the hearing of extradition cases, are entitled to

avail themselves of legal counsel ; and such counsel have the right to be heard and act in their behalf, as in other cases in which counsel represent their clients in courts of justice. Extradition is no exception to this general principle of law.

(2.) *Documentary Evidence.* — This is regulated by special statute ; and on this subject Congress has legislated at different times, as will appear from the following statement :

The first regulation is supplied by the second section of the Act of August 12, 1848 (9 U. S. Stat. at Large, 302), which reads as follows :

“ That in every case of complaint as aforesaid, and of a hearing upon the return of the warrant of arrest, copies of the depositions upon which an original warrant in any such foreign country may have been granted, certified under the hand of the person or persons issuing such warrant, and attested upon the oath of the party producing them to be true copies of the original depositions, may be received in evidence of the criminality of the person so apprehended.”

This confined the documentary evidence entirely to copies of the depositions, certified and attested in the manner prescribed, upon which the original warrant of arrest was granted in the foreign country.

The next regulation is supplied by the Act of June 22, 1860 (12 U. S. Stat. at Large, 84), which reads as follows :

“ That in all cases where any depositions, warrants, or other papers, or copies thereof, shall be offered in evidence upon the hearing of an extradition case under the second section of the Act entitled ‘ An Act for giving effect to certain treaty stipulations between this and foreign Governments for the apprehension and delivery up of certain offenders,’ approved August 12, 1848, such depositions, warrants, and other papers, or copies thereof, shall be admitted and received for the purposes mentioned in the said section, if they shall be properly and legally authenticated, so as to entitle them to be received for similar purposes by the tribunals of the foreign country from which the accused party shall have escaped, and the certificate of the principal diplomatic or consular officer of the United States, resident in such foreign country, shall be proof that any paper or other document, so offered, is authenticated in the manner required by this act.”

Such was the state of the law on this subject when, in 1874, the Revised Statutes of the United States were enacted, reading as follows in section 5271:

"In every case of complaint, and of a hearing upon the return of the warrant of arrest, copies of the deposition upon which an original warrant in any foreign country may have been granted, certified under the hand of the person issuing such warrant, and attested upon the oath of the party producing them to be true copies of the original depositions, may be received in evidence of the criminality of the person so apprehended, if they are authenticated in such manner as would entitle them to be received for similar purposes by the tribunals of the foreign country from which the accused party escaped. The certificate of the principal diplomatic or consular officer of the United States, resident in such foreign country, shall be proof that any paper or other document so offered is authenticated in the manner prescribed by this section."

Upon comparing this section with the two preceding acts of Congress on the same subject, we find that the first part of it, embracing the subject-matter, is taken entirely from the second section of the Act of August 12, 1848, and not at all from the Act of June 22, 1860, and that the only part which is taken from the latter act relates simply to the authentication of the documentary evidence and the certificate of the diplomatic or consular officer of the United States. It was on this ground that Judge Blatchford, in *In re Stupp*, 12 Blatch. 501, 523, held that, under the provision of section 5596 of the Revised Statutes, "section 5271 is not in force in lieu of the Act of 1860, although it is in force in lieu of the second section of the Act of 1848." This ruling was made in 1875, and, according to it, the Act of 1860 was still operative, notwithstanding the enactment of the Revised Statutes, including section 5271 of these statutes.

Congress, by the Act of June 19, 1876 (19 U. S. Stat. at Large, 59), so amended section 5271 of the Revised Statutes as to make it read as follows:

"In every case of complaint and of a hearing upon the return of the warrant of arrest, any depositions, warrants, or other papers offered in evidence, shall be admitted and received for the purpose of such hearing, if they shall be properly and legally

authenticated so as to entitle them to be received as evidence of the criminality of the person so apprehended, by the tribunals of the foreign country from which the accused party shall have escaped, and copies of any such depositions, warrants, or other papers shall, if authenticated according to the law of such foreign country, be in like manner received as evidence; and the certificate of the principal diplomatic or consular officer of the United States, resident in such foreign country, shall be proof that any such deposition, warrant or other paper, or copy thereof, is authenticated in the manner required by this section."

This struck out from the section that part which was taken from the second section of the Act of August 12th, 1848, and put in its place the substance of the Act of June 22d, 1860.

The last action of Congress on this subject we have in the Act of August 3d, 1882 (22 U. S. Stat. at Large, 215), the fifth and sixth sections of which provide as follows:

"Sec. 5. That in all cases where any depositions, warrants, or other papers, or copies thereof shall be offered in evidence upon the hearing of any extradition case under Title sixty-six of the Revised Statutes of the United States, such depositions, warrants, and other papers, or the copies thereof, shall be received and admitted as evidence on such hearing for all the purposes of such hearing, if they shall be properly and legally authenticated so as to entitle them to be received for similar purposes by the tribunals of the foreign country from which the accused party shall have escaped, and the certificate of the principal diplomatic or consular officer of the United States, resident in such foreign country, shall be proof that any deposition, warrant, or other paper or copies thereof, so offered, are authenticated in the manner required by this act."

"Sec. 6. The act approved June 19th, 1876, entitled "An Act to amend section 5271 of the Revised Statutes of the United States; and so much of said section 5271 of the Revised Statutes of the United States as is inconsistent with the provisions of this act, are hereby repealed."

Such then is the present state of the law as to documentary evidence in extradition cases. The sole purpose of introducing such evidence is to enable the magistrate, before whom the hearing is had, to judge and determine whether the crime charged is so proved that the party arrested ought to be held for delivery. Any depositions, warrants, or other papers that may be offered



upon the hearing are to be received and admitted as evidence relatively to this purpose, if they are so authenticated as to entitle them to be received for a similar purpose by the tribunals of the foreign country from which the accused party has escaped; and on this question of authentication the certificate provided for is conclusive proof. The documents, no matter what may be their specific character, are admissible as evidence, if they come within the terms of the statute. What they prove is a question for the magistrate to determine, after examining them. He is to receive them as evidence and judge of their weight.

Judge Shipman, in *In re Heinrich*, 5 Blatch. 412, 426, said: "The parties seeking the extradition of the fugitive should be required by the Commissioner to furnish an accurate translation of every document offered in evidence which is in a foreign language, accompanied by an affidavit of the translator, made before him or some other United States Commissioner, or a Judge of the United States, that the same is correct." He also said that "each piece of documentary evidence offered by the agents of the foreign Government" should be accompanied by the certificate prescribed by the statute on this subject.

Judge Blatchford, in *In re Farez*, 7 Blatch. 345, held that where the charge is forgery, and where, by the depositions from abroad put in evidence under the Act of June 22d, 1860, it appears by their depositions that the forged papers were produced to and deposed to by the witnesses giving the depositions, it is not necessary that the forged papers should be produced here before the Commissioner. Such a case, as the Judge remarked, "stands precisely as if the witnesses had been examined in person before the Commissioner, and the alleged forged papers had been produced to them before him." "The judicial authorities here are bound to give to them [the depositions] the same effect as if the witnesses themselves were personally present and testifying." Such is the plain intention of the law.

It was also held by Judge Blatchford in the same case that, under the act of June 22, 1860, it was not necessary, in order to render papers admissible in evidence, that they should be the papers on which a warrant of arrest was issued abroad. This is not under the law essential to their admissibility. Indeed, in *In re Thomas*, 12 Blatch. 370, 380, Judge Blatchford said:

"It is not a necessary preliminary to an investigation here, under an extradition treaty, that a warrant of arrest should have been issued, or proceedings had, against the accused, in the foreign jurisdiction."

Judge Brown, in *In re Wadge*, 15 Fed. Rep. 864, held as follows: (1.) That the authentication of documents in extradition proceedings, which would be received "in similar proceedings" in the demanding country, when aided by oral proof of handwriting, and by proof showing the purpose for which they are issued, is sufficient under section 5 of the Act of August 3, 1882. (2.) That it is not the practice before committing magistrates to receive the depositions of foreign witnesses taken abroad on the part of the defense, and hence that the Commissioner in extradition proceedings rightly refused an adjournment applied for by the accused to enable him to obtain the depositions of witnesses in his defense from the country of the demanding Government, and that his refusal was not such an abuse of judicial discretion as to be remedied by *habeas corpus*.

The ruling of Judge Brown in this case was, in *In re Wadge*, 16 Fed. Rep. 832, affirmed by Judge Wallace, of the Circuit Court of the Second Circuit of the United States, who held as follows: (1.) That in extradition proceedings under section 5 of the Act of August 3, 1882, the certificate is not the exclusive source of authentication, but may be assisted by other evidence, and that it need not appear that the depositions or documentary evidence would be competent upon the trial of the accused in the foreign tribunal, if sufficient to authorize his arrest. (2.) That where the depositions and proofs present a sufficient case to the Commissioner for the exercise of his judicial discretion, his judgment will not be reviewed. (3.) That a refusal to grant an adjournment to enable the accused to procure depositions from England to show an *alibi*, was, in this case, a legitimate exercise of discretion.

Judge Blatchford, in *In re Fowler*, 18 Blatch. 430, 437, and 438, held that while the certificate as to authentication of documents provided for, if in the proper form, is to be taken as absolute proof, "there is nothing in the statute which necessarily excludes oral proof authenticating the copies, or oral proof as to what the law of the foreign country is as to such authentication, or oral proof

that such oral authentication is according to the law of the foreign country." He added: "There is nothing in the statute which makes such certificate of the United States diplomatic or consular officer the only competent proof that either the originals or the copies are authenticated in the manner required by the statute." The certificate in this case was held to be defective; yet, in respect to some depositions, this defect was supplied by oral evidence as to their authentication, and this was treated as sufficient.

**5. Amount of Evidence Necessary.** — The evidence necessary, in order to justify a commitment of the accused party to await the action of the President, is such an amount as is "sufficient to sustain the charge under the provisions of the proper treaty or convention." The general rule, as to the evidence, adopted in the extradition treaties of the United States, is that the accused party shall be delivered up "upon such evidence of criminality as, according to the laws of the place where" he is found, "would justify his apprehension and commitment for trial if the crime or offense had there been committed."

This is the treaty rule as to the sufficiency of the evidence. The laws of the delivering country are referred to as the guide on this subject; and evidence that, according to these laws, is sufficient to justify the arrest and commitment of a party for trial, will be sufficient to justify the arrest and commitment of a party for extradition. The examining magistrate is to apply this rule; and if he finds the evidence sufficient in this sense, then he is to commit the party for extradition. The application of the rule includes the laws of the particular State in which the proceeding is had; and hence, if by these laws a prisoner is entitled to testify in his own behalf, then this privilege must be accorded to the accused person.

Mr. Justice Nelson, in *Ex parte Kaine*, 3 Blatch. 1, 10, said: "The proof, in all cases under a treaty of extradition, should be not only competent, but full and satisfactory, that the offense has been committed by the fugitive in the foreign jurisdiction — sufficiently so to warrant a conviction, in the judgment of the magistrate, of the offense with which he is charged, if sitting upon the final trial and hearing of the case. No magistrate should order a surrender short of such proof."

This, with all due respect to the learned justice, is not the rule prescribed by the treaties of the United States. Their rule is that the evidence should be sufficient to justify the apprehension and commitment of the party for trial, if the offense had been committed in the country on which the demand is made. Chief Justice Marshall, in the case of *Aaron Burr*, sat as a committing magistrate; and as to the question whether he should commit Burr for the crime charged against him, he remarked:

“On an application of this kind, I certainly should not require that proof which would be necessary to convict the person to be committed, on a trial in chief; nor should I even require that which should absolutely convince my own mind of the guilt of the accused: but I ought to require, and I should require, that probable cause be shown; and I understand probable cause to be a case made out by proof, furnishing good reason to believe that the crime alleged has been committed by the person charged with committing it.” (1 Burr’s Trial, 11.)

The Chief Justice held that this was the fact in the case of Burr, and hence committed him for trial, not on the theory that he would have convicted him upon the evidence, but that the evidence was sufficient for a commitment, with a view to a trial.

Mr. Justice Blatchford, in *In re Farez*, 7 Blatch. 345, 358, expressed his opinion in regard to the necessary evidence in an extradition case, as follows:

“The theory on which treaties for extradition are made is, that the place where a crime was committed is the proper place in which to try the person charged with having committed it; and nothing is required to warrant extradition, except that sufficient evidence of the fact of the commission of the crime shall be produced, to justify a commitment for trial for the crime. In acting under the thirty-third section of the Judiciary Act of 1789, in regard to offenses against the United States, a committing magistrate acts on the principle that, in substance, after an examination into the matter and a proper opportunity for the giving of testimony on both sides, there is reasonable ground to hold the accused for trial. The contrary view would lead to the conclusion that the accused should not be given up to be tried in the country in which the offense was committed, the country where the witnesses on both sides are presumptively to be found, but should be tried in the country in which he may happen to be found. Such a result would entirely destroy the object of such treaties.”

The view of Judge Blatchford, and not that of Mr. Justice Nelson, is the correct one. Persons charged with crime may, according to the laws and practice of this country, be committed for trial upon evidence which creates a reasonable presumption of guilt, even though the proof, as then presented, might not be sufficient to warrant their conviction. This is the rule to apply in extradition cases. The preliminary examination, with reference to the discharge or commitment of the accused party, is not a trial with a view to conviction and punishment. It relates simply to the question whether the party ought to be held for delivery that he may be tried by a court having jurisdiction. A reasonable presumption of guilt is enough for this purpose; and on this question of fact the examining magistrate must, in the light of the evidence, pass judgment.

**6. Certification and Commitment.**—Section 5270 of the Revised Statutes of the United States still further provides that if the examining magistrate, on such hearing, “deems the evidence sufficient to sustain the charge under the provisions of the proper treaty or convention, he shall certify the same, together with a copy of all the testimony taken before him, to the Secretary of State, that a warrant may issue upon the requisition of the proper authorities of such foreign Government, for the surrender of such person, according to the stipulations of the treaty or convention; and he shall issue his warrant for the commitment of the person so charged to the proper jail, there to remain until such surrender shall be made.”

This certification of the testimony and commitment of the accused party to jail, upon the condition here specified, dispose of the case, so far as the examining magistrate is concerned with it; and then the question of actual surrender goes to the President, who, as we have already seen, exercises the power of review, and may make or withhold the surrender, according to his own judgment in the light of the certified testimony. The object of certifying the testimony to the Secretary of State is to supply the means of such a judgment. And if the President does not deliver up the party within two calendar months after his commitment, then he may be discharged as provided in section 5273 of the Revised Statutes

The examining magistrate acts judicially in his hearing and disposal of the case; and while he is thus acting he is not subject to any direction or control by the President. Whether he shall commit or discharge the party is a question for him to determine. If he deems the evidence insufficient to sustain the charge, and, hence, discharges the accused, that is the end of the case, unless there be a new complaint and a new arrest. The alleged fugitive, though thus discharged, may, however, be arrested on a new complaint. (*Calder's Case*, 6 Op. Att.-Gen. 91.)

It was held, in the *Case of Muller*, 10 Op. Att.-Gen. 501, that a discharge, by a District Judge, of a person apprehended as a fugitive from justice, does not, in a proper case, preclude his re-arrest under the warrant of another judge, with a view to a re-examination of the case. Muller, who was discharged by Judge Leavitt, was re-arrested under another warrant, and brought before Judge Cadwalader, at Philadelphia, under whose decision he was surrendered to the Prussian Government. This was done at the suggestion of the Attorney-General of the United States.

**7. Review by Habeas Corpus.** — We have already considered the question whether a party, committed for extradition, may avail himself of a writ of *habeas corpus* issued by a competent court, *after* the President has issued his warrant of surrender, and before the party is actually removed from the jurisdiction of the United States. This question was answered in the affirmative. (*Ex parte Kaine*, 3 Blatch. 1.)

It remains now to consider the relation of the *habeas corpus* power to the case, after commitment by the examining magistrate, and before the President's warrant of surrender. There is a period of time between the two events, during which the party is in custody, and it may extend to two calendar months.

The custody is "under or by color of the authority of the United States," and this brings it within the list of cases enumerated in section 753 of the Revised Statutes of the United States, in which the Supreme Court, the Circuit and District Courts, and the several Justices and Judges thereof may issue writs of *habeas corpus*, for the purpose of inquiring into the cause of the restraint of liberty. There is no doubt that these courts and the several Justices and Judges thereof may issue writs of *habeas corpus* in

such cases, and also writs of *certiorari* when necessary for the exercise of their respective jurisdictions. (*Ex parte Stupp*, 12 Blatch. 501.)

Mr. Justice Nelson, in *Ex parte Kaine*, 3 Blatch. 1, held that when the prisoner was arrested under an extradition treaty between the United States and Great Britain, and committed by a magistrate after examination, and then a *habeas corpus* was sued out by him before a Circuit Court of the United States, which, after hearing, dismissed the writ, and remanded the prisoner to be held under the commitment of the magistrate, the decision of such court was no bar to an inquiry by a Justice of the Supreme Court of the United States, upon a *habeas corpus* issued by him, into the legality of the detention of the prisoner under said commitment.

It was held by Judge Woodruff, in *In re McDonnald*, 11 Blatch. 79, that it is not proper, during the progress of proceedings before a Commissioner to resort to a writ of *habeas corpus* to review his decision on questions as to evidence.

Most of the extradition cases in which writs of *habeas corpus* have been issued, were, in the first instance, considered and decided by Commissioners, and the decisions as to the extent to which the review may be carried by the revising court will appear in the following cases :

In *The Matter of Veremaitre and others*, 9 N. Y. Leg. Obs. 137, Judge Judson, sitting in the District Court of the United States for the Southern District of New York, held that he had no power to revise the judgment of the Commissioner on the questions of fact, and hence, on inspecting the papers, and finding them sufficient on their face, he declined to review the proofs, and remanded the prisoners to be held subject to the warrant of the Commissioner and the action of the executive authorities of the United States.

Judge Betts, in *The Matter of Thomas Kaine*, 10 N. Y. Leg. Obs. 257, delivered an elaborate opinion in regard to various points involved in the case, and substantially affirmed the doctrine laid down by Judge Judson in the preceding case.

*Judge Ingersoll*, in the District Court for the Southern District of New York, in *The Matter of Heilbronn*, 12 N. Y. Leg. Obs. 65, said :

"Where there is any legal evidence before the Commissioner to establish the charge, and that legal evidence is deemed by him sufficient, no matter how many others may deem it insufficient, and he grants a warrant of commitment, that commitment must stand, and no judge has a right to disregard it, or to render it ineffectual, at least not till the expiration of two calendar months after it shall have been issued. In such a case, no one can revise the opinion of the Commissioner but the President. The President has that power. If he should be of opinion that the evidence taken before the Commissioner on the hearing was not sufficient to sustain the charge, then it would be his duty to withhold a warrant of extradition. If it should be his opinion that it was sufficient, then it would be his duty to grant such warrant. The necessities of the case, therefore, do not require that I should express an opinion upon the sufficiency of the evidence upon the hearing before the Commissioner."

Judge Betts, in *Ex parte Van Aernam*, 3 Blatch. 160, 164, said: "In my view of the subject, this court, on the return before it of a writ of *habeas corpus*, has no further power than to ascertain and determine whether the prisoner stands charged with a criminal offense subjecting him to imprisonment, and whether the Commissioner possessed competent authority to inquire into and adjudge upon that complaint. I find affirmatively, in this case, on both of those inquiries, and therefore decide that I have no authority, under this writ, to review the justness of the decision of the Commissioner."

Judge Shipman, in *In re Henrich*, 5 Blatch. 414, 419, referred to the case of *Ex parte Kaine*, 3 Blatch. 1, decided by Mr. Justice Nelson, and then proceeded to say:

"It is true that Mr. Justice Nelson, in the case of *Kaine*, decided that the Commissioner had no competent evidence before him. He, therefore, did not directly determine the precise question whether, if the Commissioner had had competent evidence presented to him, tending to prove the charge of criminality, it would have been within the rightful power of the court, or of the Judge at Chambers, to review that evidence, and, if he thought it failed to support the charge against the prisoner, to discharge him from custody under the Commissioner's warrant. But the whole spirit and scope of his reasoning, in the opinion delivered by him in the Supreme Court, as well as in the one delivered by him at Chambers, tend toward the assertion and vindication of this power. To set the matter at rest, however, I am authorized



by him, after full consultation on the point, to state that such is his judgment of the law. It is then the law of this court, and it is therefore the duty of the court, in the present case, to look into the evidence upon which the judgment of the Commissioner rested, and which has been certified up to this tribunal, in compliance with the writ directed to him, and to pass upon its weight as well as upon its competency."

The ruling of Judge Shipman in this case contradicted the doctrine established by the previously cited cases, as to the extent to which a court could, in a *habeas corpus* proceeding, review the action of a Commissioner in an extradition case.

Judge Blatchford, in *In re Stupp*, 12 Blatch. 501, submitted the question to a careful and elaborate examination, and came to a conclusion which he expressed as follows:

"The court issuing the writ must inquire and adjudge whether the Commissioner acquired jurisdiction of the matter, by conforming to the requirements of the treaty and the statute; whether he exceeded his jurisdiction; and whether he had any legal or competent evidence of facts before him, on which to exercise a judgment as to the criminality of the accused. But such court is not to inquire whether the legal evidence of facts before the Commissioner was sufficient or insufficient to warrant his conclusion. Nor, if there was legal and competent evidence of facts before the Commissioner, for him to consider in making up his decision as to the criminality of the accused, is the court, on *habeas corpus*, to hold the proceedings illegal and to discharge the prisoner because some other evidence was introduced which was not legal or competent, but was held to be so by the Commissioner and was considered by him on the question of fact, or because the court, on a consideration of all the evidence which the Commissioner considered, would have come to a different conclusion, or because the court, on an exclusion of such of the evidence as it may think was not legal or competent, would come, on the rest of the evidence, to a different conclusion of the fact from that at which the Commissioner arrived. In other words, the proper inquiry is to be limited to ascertaining whether the Commissioner had jurisdiction, and did not exceed his jurisdiction, and had before him legal and competent evidence of facts whereon to pass judgment as to the fact of criminality, and did not arbitrarily commit the accused for surrender, without any legal evidence."

Judge Blatchford referred to the case of *Ex parte Lange*, 18

Wall. 163, and the cases there cited, in support of these principles as to the jurisdiction to be exercised on *habeas corpus*.

Judge Johnson, in *In re Vandervelpen*, 14 Blatch. 137, held that where an extradition case, under a treaty, is brought before a United States Commissioner, it is his judicial duty to judge of the effect of the evidence, and no other judicial officer has any power to review his action thereon. The same view was held in *In re Wiegand*, 14 Blatch. 370; also in *In re Wahl*, 15 id. 334; in *In re Fowler*, 18 id. 430; and in *In re Wadge*, 16 Fed. Rep. 332.

These cases settle the question that the decision of a United States Commissioner, in an extradition case, on the merits of that case, with legal and competent evidence of facts before him, is not open to review in a proceeding on *habeas corpus*. The law makes him the judge as to what the evidence proves in respect to the criminality of the accused, as really and as fully as it would make the Chief Justice of the United States such a judge if he were sitting as an examining magistrate. There is no power to review the judgment, in either case, except in the President of the United States after all the testimony has been certified to him.

The result is that, where a party has been arrested, examined and, by the examining magistrate, committed for extradition, and all his remedies, whether by a writ of *habeas corpus* or *certiorari*, or by both in conjunction, have been exhausted without his discharge, the case is judicially finished. Nothing then remains but the action of the President, in the exercise of the power conferred on him by the treaty or by the law, or by both.

**8. The Theory of the Law.**—The theory of the law is to combine, in all cases of extradition from the United States, two distinct and independent functions.

The President, on the one hand, except in cases arising under treaties which authorize him to issue warrants for the arrest of fugitive criminals, in order that they may be brought before the proper judicial tribunals, has no power to issue such warrants, or to conduct the preliminary examination of the accused party, or decide in the first instance upon the question of his criminality. These are judicial functions, and over them the President has no

control. (*Calders' Case*, 6 Op. Att.-Gen. 91.) He can make no delivery of the alleged fugitive until the proper magistrate has considered and acted upon the case; and this is a restraint upon his power, as well as a guide to its proper exercise.

The judicial power, on the other hand, when it decides that the case is a suitable one for extradition, can neither order the delivery nor bind the action of the President by its judgment. He may or may not, for reasons of which he is the sole judge, follow that judgment. He is not merely a ministerial officer. The executive function of delivery, after the judicial action, with all the testimony connected therewith, has been certified to the Secretary of State, carries with it the power of reviewing all the proceedings in the case and passing an independent judgment upon their correctness. The President acts upon his own judgment in determining whether he will issue a warrant for the surrender of the party committed.

This distribution of the legal functions to be performed, between the executive and judicial departments of the Government, while making the former auxiliary to the latter, secures to the accused party a high degree of certainty that he will be surrendered to a foreign Government only when all the necessary conditions are present. The judiciary cannot surrender him, and the President cannot do it until the judiciary has decided that the case is a proper one for delivery, and even then he may revise and reject that decision. It is difficult to see how the law could furnish a more complete protection against abuses of the extradition power, especially when we add that the writ of *habeas corpus*, as a means of testing the legality of the proceedings, is always available to the accused party, if sought before his actual removal from the country.

## CHAPTER XIX.

## THE CASES OF TULLY AND ENO.

Both of these cases are of recent occurrence — the one being considered and determined in this country, and the other in Canada. No report has as yet been given of either case, except such as may be found in the ordinary secular newspaper. Relying upon this source of information, and desiring to incorporate the substance of both cases in the present treatise, nearly the whole of the first Part of which is already printed, the author judges it expedient to add these cases as a supplementary chapter to Part I.

**1. The Case of Tully.** — This case was considered, in the first instance, by United States Commissioner Shields, of the city of New York, who issued his warrant for the arrest of Tully, as a fugitive from justice, on the charge of forgery preferred against him by the Preston Banking Company of Preston in England. Forgery is one of the crimes specified as an extradition offense in the tenth article of the treaty of 1842 between the United States and Great Britain; and hence, upon the supposition that this charge was established by sufficient evidence, and that a demand by Great Britain for the delivery of the accused had been made, it would be the duty of the executive authority of the United States to make the delivery.

The question before Commissioner Shields was, whether the proof established the charge of forgery with sufficient certainty to justify the commitment of the party for trial if the offense had been committed in this country. Answering this question in the affirmative, after a preliminary examination, he issued a warrant for the commitment of Tully, to await the action of the executive authorities at Washington. This was done in pursuance of section 5270 of the Revised Statutes of the United States.

Tully then sued out a writ of *habeas corpus* from the District Court of the United States for the Southern District of New York; and Judge Brown, upon the hearing of the case, discharged him from custody, on the ground that the acts set forth in the charge and shown by the proof did not, according to English

law, as construed by the Court of Appeals in England, in the case of Windsor, which was essentially parallel to that of Tully, constitute the crime of forgery. This he regarded as conclusive for the purpose of disposing of the case. The offense provided for in the treaty is forgery, and the charge against Tully was that of forgery; but the acts set forth in the charge were not, according to the English decision referred to, forgery by English law, and this was sufficient to entitle Tully to a discharge.

Judge Brown, in giving his decision, said that it had been the custom of the Preston Bank to make advances of money on security to Railton Sons & Leedham, of Manchester; that Tully had a general authority from the bank to draw checks upon its agents in reducing their balances; and that the practice on doing so was for Tully to fill out a printed memorandum termed a "blue slip," showing the amount drawn, and from whom, and how the proceeds were disposed of. He then proceeded to say:

The complaint charges and the proof shows that Tully upon three occasions drew checks upon the bank's agents, received the money from them, rendering to the bank blue slips, crediting the drafts to the agents, and directing the debit of the amounts to certain customers of the bank. The proof warrants the inference, however, that the money was appropriated by Tully to his own use and invested with the persons against whom it was charged. Three transactions of this kind are mentioned in the complaint, all similar, one of which is as follows: On the 23d of October, 1882, Tully drew a check upon the Manchester and Salford Bank (limited) for £1,000, payable to self or bearer, signed The Preston Banking Company, G. T. Tully, Sub-Manager. The drawee was one of the agents of the Preston Bank. Tully received the money in person, and on the 4th of November following rendered the accountant's bureau of the Preston Bank the following blue slip:

PRESTON, 4—11—1882.

The Preston Banking Co.

Debit investment acc't. to Railtons'

credit. M. & S. Bank, Man. do.

£1,000 ..... 'P.'

In October, 1883, Tully absconded. On examination of the books and accounts several leaves of the investment ledger were found missing, and Railtons' account was missing. Evidence from the Railtons shows that no such money was received by them.

The complaint charges forgery in respect to the drafts, and also in regard to the blue slips, in uttering a certain written instrument purporting to be an accountable receipt, dated on the 4th November, 1882, for the sum of £1,000, purporting to be invested with Railton Sons & Ieedham.

The Commissioner held that the crime of forgery was not made out in respect to the checks or drafts upon which the money was procured by Tully, but has held the prisoner for forgery on the ground that the blue slips were accountable receipts. The blue slips were nothing more than a mere direction to credit the agent and charge Railton, although it contained by implication a representation of the investment of the amount named with the Railtons. That would not have constituted forgery, but merely a false representation in writing. It could only become forgery by virtue of some quality of evidence which it might possibly acquire in Tully's favor under the usage and practice of the bank tending to acquit him for the money which he had drawn from the agent.

For the purposes of this hearing, however, on a claim of extradition by the British Government, I am precluded from passing upon this as an original question, inasmuch as in a case identical with the present, as it seems to me, in all essential particulars, the Court of Appeals in England has held this offense not to be forgery. I refer to the case of Charles Windsor, who, in 1869, was arrested in London on the charge of forgery upon a mercantile bank in this city, in making false and fraudulent entries in the books of the bank. There has been no change in the laws or statutes of either country, so far as I know, since this decree.

It is immaterial what my own judgment might be — whether as an original question, the case of Windsor or that of Tully constitutes forgery at common law, so long as the point has been adjudicated to the contrary in England, in whose behalf the extradition is here sought. The blue slips in this case cannot by any possibility have a greater effect than Tully's own entries in the books of the bank, according to the usages of the bank, would have had. It is only, as some possible evidence in Tully's favor, that such entries on these blue slips as the equivalent of such entries could be any thing different from what they purport to be. The attention of the English Court of Appeals being called to this point, they deliberately overruled it as insufficient. This adjudication must be deemed to be the settled law of England until in some way modified or reversed, and I have not found any contrary or inconsistent adjudication. While the definitions of forgery there given are in some respects, I think, too limited, the case of Windsor as an authority determines the English law as regards forgery in this particular. By that adjudication Tully could not be convicted or lawfully charged with the offense of

forgery in respect to the transactions here complained of, and it would evidently be improper to order his extradition upon a charge which the law of that country declares cannot be maintained as constituting forgery under the treaty. (New York *Times*.)

Judge Brown, it will be perceived, does not rest his decision upon the assumption that the offense of Tully is not a forgery at common law, although he says that his action in connection with the "blue slips" is not forgery, but "merely a false representation in writing." It was, however, sufficient for his purpose that in a proposed extradition to England, the acts of Tully did not constitute forgery by the laws of that country, as construed in the Windsor case.

The Judge did not directly pass upon the question, whether if these acts had by the English statute constituted the crime of forgery, he would have accepted this as conclusive that Tully was guilty of the forgery known to the common law of the two countries when the treaty was made. It was not, according to the view he took of the case, necessary to decide this point. He said: "It is immaterial what my own judgment might be, whether, as an original question, the case of Windsor or that of Tully constitutes forgery at common law, so long as the point has been adjudicated to the contrary in England, in whose behalf the extradition is here sought."

Charles Windsor, whose case is thus referred to by Judge Brown, was the paying teller of the Mercantile Bank in the city of New York. He embezzled more than two hundred thousand dollars of the funds of the bank, and concealed the deficiency by a series of false entries in the books of the bank. He was indicted under a statute of the State of New York for forgery in the third degree, and having fled to England, his extradition was demanded by the Government of the United States under the treaty of 1842. The acts of Windsor, which were simply acts of embezzlement, were, under the New York statute, claimed to be forgery in the third degree, and this raised that question whether that statute correctly defined the forgery that was meant in the extradition treaty between the United States and Great Britain. This question was answered in the negative by the English Court of Queen's Bench.

Lord Chief Justice Coleridge said in this case: "We must assume that the terms used by the parties to this treaty, especially as they were parties speaking the same language, and with laws so alike, were used in the sense which they bear in our own law and in the law of the United States, and not in that which they have in any particular State of the Union. We must take the term 'forgery' in the Extradition Act to mean that which by universal acceptation it is understood to mean, namely, the making or altering a writing so as to make the writing or alteration purport to be the act of some other person, which it is not.' "

The treaty uses the term "forgery," but does not define it, and the assumption of the Lord Chief Justice is that the treaty sense of the term, as understood and meant by both parties when using it, is that of the common law, and that neither party can by a local statute so enlarge the sense as to make it embrace other acts, and then claim extradition for these other acts on the basis of such statutory enlargement. Both parties are bound, and only bound, by the treaty in the sense attached to its terms when the treaty was made.

There can be no question as to the correctness of this rule of construction, and under it Lord Chief Justice Coleridge held in the case of Windsor that the accused party could not under the treaty of 1842, be extradited from one country to the other, for the conclusive reason that the acts charged and shown did not bring the case within the provisions of the treaty. Any other rule of construction would permit either Government indefinitely to enlarge the list of extradition crimes, by simply enlarging the meaning of the terms by which these crimes are designated. This is manifestly not allowable.

The statutes of New York State specify three degrees of burglary, the first of which is the common-law offense of burglary. Judge Fancher, in *Lagrange's Case*, 14 Abb. Pr. (N. S.) 333, said that the burglary meant in the extradition treaty of 1843 with France, "refers to the common-law offense of burglary," and that the treaty made no provision "for the demand and extradition of a fugitive for our statutory offense of burglary in the third degree." The crime charged against Lagrange was simply burglary in the third degree by a local statute of New York, and not the burglary, as the Judge held, intended in the treaty; and



on this ground he regarded the extradition proceedings in this case as being "unauthorized and illegal." The crime set forth in these proceedings was not the one specified in the treaty ; and the mere fact that Lagrave had been actually extradited did not change the character of the proceedings. This case, in the principle involved, is identical with the cases of Windsor and Tully.

**2. The Case of Eno.**—Eno, who was the President of the Second National Bank of New York city, had been guilty of embezzling the funds of the bank to a large amount, while he was acting as its President. Upon the discovery of this fact, he at once fled to Canada. After his flight indictments were found against him in the city of New York, three of them being for forgery in the third degree, and the fourth for forgery in the second degree, under the Penal Code of the State of New York.

Eno was arrested in Quebec as a fugitive from justice, with a view to his extradition to the United States under the treaty of 1842 with Great Britain. Upon the final hearing of his case before Judge Caron, the evidence of witnesses and also the indictments were introduced, as the means of proving the charge against him, and on that basis securing his extradition. Judge Caron, however, regarded the case as not coming within the provisions of the treaty, and discharged the prisoner from the arrest. He delivered a lengthy opinion upon the question, an abstract of the leading points of which, as given in the *New York Times*, July 13, 1884, is as follows :

He reviewed the history of the case briefly, and then entered at once into the charges formulated against Eno for which his extradition was demanded. He went into the evidence adduced in the case, that of Mr. Adams, the Assistant District Attorney, who had explained the law of New York concerning forgery, and that of the bank officers and public accountant, who had proved the false entries in the Clearing House book and the defalcations of the accused. Respecting the stress laid by the prosecution upon the use of fictitious names in Eno's handwriting in the back of the bank book as recipients of alleged loans, he quoted Cashier Roberts' testimony that it was usual to evade the law respecting national banks in this manner, and that the same was done by Eno's predecessor in the bank. He devoted a very long time to the question of foreign indictments by Grand Juries, and rejected the pretension of the prosecution that they were admissible as

evidence in cases of extradition, holding that they could not be classed as depositions such as are required by the terms of the extradition treaty. They were not sworn statements of facts to the knowledge of the juries, but accusations or declarations of guilt which required to be investigated by the presiding Judge. In support of this stand, Judge Caron quoted at great length from leading authorities, including Chief-Justices of both Ontario and Quebec.

In regard to the ninety-five-thousand-dollar check, which, it was alleged, had been forged by the prisoner in having been signed by him as President of the bank after he had ceased to be President, his Honor spoke at great length. He minutely analyzed the evidence given under this head, showing by the hour at which the meeting of Directors was held when Eno's resignation was offered and by the time at which the check in question was deposited in the Union National Bank that it must have been signed and issued by the accused during office hours on the day on which he resigned his Presidency late in the evening. Moreover, the Cashier, Mr. Roberts, had deposed that he had no doubt at all in his mind that the check in question was signed by Eno, while holding the office of President of the bank.

The Judge treated very fully of both the law and practice in extradition matters, quoting from Judge Brown's decision in the Tully case and speaking of his support of the doctrine enunciated in the Windsor case, that the crimes to be affected by the extradition treaty must be construed by the laws which designated them at the time the treaty was formed. The extradition treaty required that before a fugitive could be handed over to the demanding power, there must be adduced such evidence as would justify his apprehension and trial for the alleged offense if committed in the surrendering country. His Honor passed to an elaborate dissertation on the crime of forgery, quoting a large number of definitions. He leaned to such as defined it as the false making of an instrument, intended to prejudice public or private rights, but he held that a lie did not become a forgery because it was reduced to writing. With what the laws of New York constituted forgery he had nothing to do. At all events, the check complained of was scarcely forgery, even by the laws of New York, since the bank paid the check, which it need not have done had it been a forgery. It was what it purported to be.

Neither was there any evidence, the Judge continued, that Eno had altered any documents or papers signed by others, or so made or signed papers or documents as to make them appear to be the work of others. He referred again at very great length to the Tully case, arguing that the prosecution could not blame him for having taken the same interpretation of British law in dealing with an American citizen on British soil as had been laid down

by Judge Brown, an American Judge, in the case of a British subject on American territory. He referred to the abuse of the confidence reposed in him by the accused, but said it was not his duty to pass judgment upon that. His duty was as stern and inflexible as the law, but after the authorities he had quoted, the definition of forgery in the Windsor and the Tully cases, and the close study which he had made of the record, he was compelled to declare that he found nothing to justify the extradition of the accused and must order his discharge from custody

The main point in this deliverance is the fact that the crimes charged in the indictments against Eno, and sought to be proved by the evidence, did not, so far as the proof went, constitute the offense of forgery, in the sense of the treaty of 1842 between the United States and Great Britain, which sense Judge Caron understood to be that of the common law at the time the treaty was made. No such offense, as he held, had been proved, and hence there was no sufficient reason, under the provisions of the treaty, or under the laws of Canada, to detain Eno for extradition to the United States.

The definition of forgery, given by a local statute of the State of New York, was treated as a matter of no consequence in relation to the question before the court. That statute could not change the meaning of the term "forgery," as used in the treaty, and this term Judge Caron understood to mean the forgery of the common law, which was not really charged in the indictments, and was not shown by the evidence.

Another point of some interest in respect to extradition, considered by Judge Caron, was whether indictments found in a foreign country against a party sought to be extradited from Canada, under the treaty of 1842 between the United States and Great Britain, were to be deemed evidence of the truth of the charge or charges made in such indictments. Judge Caron answered this question in the negative, and as reported in the *New York Tribune*, July 13, 1884, he spoke as follows on this point:

Because the Grand Jury of New York were of opinion *ex parte* that the prisoner should submit to trial before a petit jury, according to the laws of the United States, are we to conclude that this would justify his commitment here? The evidence must first be submitted according to the laws of Canada, and no proof out-

side of those laws can be admitted. What proof was made before the Grand Jury of New York? The indictment did not inform us on that point. Were the court to admit the indictment as *prima facie* proof of the guilt of the prisoner the right which our statute gives him of proving he had not committed a crime rendering him liable to extradition would be illusory. How could he in that case, for instance, prove that the witnesses heard before the Grand Jury in New York were not trustworthy? How could he prove the contrary of the facts laid before the Grand Jury of New York if a copy of the indictment were alone sufficient to commit him. Act 33 Vict., chapter 30, which states that an indictment found by a Grand Jury is sufficient for a commitment, refers only to the Canadian and not to the foreign Grand Juries. In the Brown case Judges Galt and Osler took this view, that a foreign indictment was not sufficient, either according to the treaty or to any act of Parliament passed since. That indictment was simply a charge by a body of persons of whose constitution or power we know nothing, and of the evidence before whom we are equally ignorant. The tenth article of the Ashburton treaty provides that the prisoner may be brought before a Judge, who will hear and weigh the evidence of his guilt. If he were to take an indictment as sufficient, how could he examine and weigh the evidence? He would fail in the very first of his duties.

The treaty of 1842 with Great Britain provides that the evidence in support of the alleged criminality of the accused shall be such "as according to the laws of the place where the fugitive or person so charged shall be found, would justify his apprehension and commitment for trial if the crime had there been committed." The question as to what the evidence shall be for the purpose of extradition, must hence be determined by the laws of the country from which it is sought to remove the accused party. The treaty does not specify the nature of this evidence or determine whether it shall be oral or documentary, or both. It leaves these points to be determined by the law of the place where the fugitive is found. Be the evidence what it may, as settled by law, if sufficient to justify the apprehension and commitment of the party for trial on the supposition that the offense had been committed in that place, then it will be sufficient for his extradition.

Judge Caron holds that an indictment in the United States, though sufficient to justify the arrest and detention of the indicted


party if found there, is not, in Canada, such evidence of the guilt of the party as would justify his detention for surrender as a fugitive criminal. It is simply an accusation made, upon *ex parte* evidence, by a grand jury in the United States, and does not, by any means, prove itself, or standing by itself, lay any ground for the surrender of the accused. It may inform the Canadian authorities as to the nature of the crime ; but it is not proof of that crime. It is simply the conclusion of the grand jury, and not sworn evidence given upon *their* knowledge of the facts.

The fourteenth section of the English Extradition Act of 1870, which is the law in Canada on this subject, provides as follows :

“ Depositions or statements on oath, taken in a foreign State, and copies of such original depositions or statements, and foreign certificates of or judicial documents stating the fact of conviction, may, if duly authenticated, be received in evidence of proceedings under this Act.”

This manifestly does not include indictments or copies of indictments found in “ a foreign State.” They are not “ depositions or statements on oath ” taken in that State, and are not proof of their own allegations. If not supplemented and sustained by the proper proof, they furnish no basis whatever for extradition from any part of the British dominions. The ruling of Judge Caron, in opposition to the claim that the indictments found against Eno in this country should be received as evidence sufficient to detain him for extradition, was clearly according to law.

The effort to get Eno back into this country, under the pretext of charging him with forgery, was virtually an attempt to mislead the Canadian authorities in the application of the treaty of 1842. What and all that he had done, as the evidence showed, was to misappropriate the funds of the Second National Bank of the city of New York, of which bank he was President, and which funds he had in his lawful custody, seeking to conceal the fact by means of falsification of the accounts of the bank. This, though possibly forgery in one or more of the lower degrees established by the local statute of the State of New York, is not forgery in the sense of the treaty of 1842 with Great Britain, any more than it is arson or burglary.



If the Government of the United States and that of Great Britain desire to extradite fugitive criminals from the territories of each other for the crime of embezzlement, or for any other crime not enumerated in the treaty of 1842, the proper course is to revise the existing treaty on this subject, or what would be better, to make a new treaty. The cases of Eno and Tully, as well as that of Windsor in 1869, ought to put an end to all further attempts, in either country, to extradite, under the present treaty, persons on the charge of forgery, when their real offense is simply that of embezzlement.



## PART II.

### INTER-STATE EXTRADITION.

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#### CHAPTER I.

##### THE CONSTITUTIONAL PROVISION.

1. **Colonial Extradition.** — The eighth article of the Confederation of the Colonies of New England, formed in 1643, contained a stipulation by which the plantations under the Government of Massachusetts, the plantation under the Government of New Plymouth, the plantations under the Government of Connecticut and the Government of New Haven, with the plantations in combination therewith, mutually pledged themselves to each other that —

“ Upon the escape of any prisoner or fugitive for any criminal cause, whether by breaking prison, or getting from the officer, or otherwise escaping, upon the certificate of two magistrates of the jurisdiction out of which the escape was made that he was a prisoner or such an offender at the time of the escape, the magistrate or some of them of the jurisdiction where, for the present, the said prisoner or fugitive abideth, shall forthwith grant such warrant as the case will bear, for the apprehending of any such person, and the delivery of him into the hands of the officer or other person who pursueth him; and if there be help required for the safe returning of any such offender, then it shall be granted unto him that craves the same, he paying the charges thereof.” (*Kentucky v. Dennison*, 24 How. 66, 101; and Winthrop’s Hist. Mass., vol. 2, pp. 121, 126.)

The necessity for this early compact grew out of the fact that the Colonies of New England were contiguous to each other, and



that criminals might easily flee from the one to the other, in order to escape punishment for their offenses. The jurisdiction of each Colony was confined to its own territory, and could not reach a criminal who had escaped to the territory of another Colony, unless he was brought back to the jurisdiction from which he had fled. To secure this result an extradition compact between these Colonies was formed, alike in the interests of public justice, and for mutual protection.

This compact was comprehensive in its scope and summary in its action. It applied to all crimes without any limitation or qualification. It was enough, for the purpose of his extradition, that the party sought was a "prisoner" who had escaped, or a "fugitive for any criminal cause," whether the escape was "by breaking prison, or getting from the officer" who had him in custody, "or otherwise escaping." This fact, in any of its forms, brought him within the terms of the compact.

So, also, it was enough that "two magistrates of the jurisdiction out of which the escape was made" certified to the fact that the party "was a prisoner or such an offender at the time of the escape." This certificate made it the duty of "the magistrate or some of them, of the jurisdiction where, for the present, the said prisoner or fugitive abideth," forthwith to issue a warrant for his arrest and delivery to the officer or person pursuing him. The certificate was legal evidence as to the facts which it recited, and upon this basis prompt and summary action was to be taken in the case.

New articles of Confederation were formed between these Colonies in 1670; and this compact was continued, with the single modification that the certificate of one magistrate, instead of two, should be sufficient for the purpose of extradition. (13 Amer. Law Review, p. 188; Mass. Rec., vol. 4, pt. 2, pp. 471, 473.)

**2. Extradition under the Articles of Confederation.**—The Articles of Confederation, proposed by Congress in 1777, and subsequently adopted by the legislatures of the several States, under which these States assumed the title of "The United States of America," and by which they agreed to form a "Perpetual Union," and entered into "a firm league of friendship with each other," contained, in the fourth article, the following provision on the subject of extradition:

"If any person guilty of, or charged with, treason, felony, or other high misdemeanor in any State, shall flee from justice and be found in any of the United States, he shall, upon the demand of the Governor or executive power of the State from which he fled, be delivered up and removed to the State having jurisdiction of his offense."

This provision operated in and upon all the thirteen States that adopted the Articles of Confederation. It made the extradition of fugitive criminals one of the principles of their "Perpetual Union" and "firm league of friendship." The same object was had in view that led to the extradition compact of 1643 between the Colonies of New England, and the same necessity existed for the provision. These States had no jurisdiction in the territories of each other; and, hence, if a criminal escaped from the territory of one State to that of another, the only way in which he could be reached by the arm of justice was by the process of extradition.

The crimes specified for which extradition might be had from one State to another, were "treason, felony, or other high misdemeanor." Any person "guilty of, or charged with," any one or more of these crimes "in any State," who had fled "from justice," that is, from the justice of the State in which the crime was committed or charged, and who was "found in any of the United States," other than the State making the charge, was to "be delivered up and removed to the State having jurisdiction of his offense." This was to be done "upon the demand of the Governor or executive power of the State from which he fled."

It is evident, upon the face of this provision, that the respective States themselves were expected to carry it into effect. It was a compact of good faith and friendship between them, and for its execution depended entirely upon the exercise of their powers. The Congress of the Confederation had nothing to do with it, and no power to exercise in regard to it.

The provision contained no statement as to the specific method or agency by which, or as to the evidence upon which, the fugitive criminal, "upon the demand of the Governor or executive power of the State from which he fled," was to "be delivered up and removed to the State having jurisdiction of his offense." The duty of such delivery, upon the specified demand, was made im-

perative. But the manner and agency of its performance were left to be determined by the State to which the fugitive had fled, in which he was found, and to which the demand was addressed.

The provision hence needed to be supplemented by legislative action; and it was undoubtedly contemplated that the several States would so legislate on the subject as to make the provision effective for the purpose intended. In no other way could the end be gained.

**3. Extradition under the Constitution.**—The framers of the Constitution were, by no means, dealing with a new idea or a new necessity, when they proposed to incorporate the principle of inter-State extradition into that instrument. They had before them the Articles of Confederation, and were acquainted with the provision made in the compact of 1643 between the Colonies of New England.

The General Government intended to be formed under the Constitution would not so change the relations of the States to each other or so merge their powers in those of this Government, as to impair their distinct and separate independence, or create an absolutely consolidated government in which the States would, in practical effect, be reduced to the condition of mere municipalities. No such theory was entertained by those who drafted the Constitution. Their plan was that the States should still remain States, each with a defined territory, and each with a local government of its own operating therein. The necessity for inter-State extradition, as the means of public justice, would also remain.

The draft of the Constitution, proposed to the Federal Convention on the 28th of May, 1787, by Mr. Charles Pinckney, of South Carolina, contained in its twentieth article, the following provision relating to such extradition:

“Any person charged with crimes in any State, fleeing from justice to another shall, on demand of the Executive of the State from which he fled, be delivered up and removed to the State having jurisdiction of the offense.” (2 *Mad. Papers*, 745.)

This altered the phraseology of the provision as contained in the Articles of Confederation, omitting the words “guilty of,” and substituting the word “crimes,” for the words “treason, felony, or other high misdemeanor.” The word “crimes,” being

a comprehensive and generic term, was evidently intended to include all offenses committed by alleged fugitives against the laws of the State from which they had fled.

A still briefer provision is that found in the sixth section of the ninth article of the draft of a Constitution proposed by Alexander Hamilton, which read as follows :

“Fugitives from justice from one State, who shall be found in another, shall be delivered up on application of the State from which they fled.” (5 Elliott's Debates, 689.)

Here is no formal statement of any crime, as the ground of the application and the obligation of delivery, and yet the term “justice,” and the fact that the party spoken of is referred to as a fugitive therefrom, clearly imply that crime was meant to be the occasion for the application and the delivery.

The Committee of Detail, on the 6th of August, 1787, reported the draft of a Constitution to the Federal Convention, the fifteenth article of which read as follows :

“Any person charged with treason, felony, or high misdemeanor in any State, who shall flee from justice, and shall be found in any other State, shall, on demand of the executive power of the State from which he fled, be delivered up and removed to the State having jurisdiction of the offense.” (2 Mad. Papers, 1240.)

This language was largely borrowed from that used in the Articles of Confederation, and is nearly identical with it. The Federal Convention, on the 28th of August, 1787, took up the provision, as thus reported for consideration, struck out the words “high misdemeanor,” and substituted therefor the words “other crime,” as Mr. Madison says, “in order to comprehend all proper cases,” and because it was “doubtful whether ‘high misdemeanor’ had not a technical meaning too limited.” (2 Mad. Papers, 1447.) The phrase “high misdemeanor” is ambiguous, and if it had been adopted, would have left a wide margin for doubtful construction as to offenses coming within its meaning.

The provision, as reported by the Committee on Style, on the 11th of September, 1787, read as follows :

"A person charged in any State with treason, felony or any other crime, who shall flee from justice, and be found in another State, shall, on demand of the executive authority of the State from which he fled, be delivered up, and removed to the State having jurisdiction of the crime." (3 Mad. Papers, 1558.)

This differs in the language used from the form of the provision as reported by the Committee of Detail. The final form which the provision assumed when, on the 17th of September, 1787, the draft of the Constitution was completed and actually signed by the members of the Convention, is the following :

"A person charged in any State with treason, felony, or other crime, who shall flee from justice, and be found in another State, shall on demand of the executive authority of the State from which he fled, be delivered up, to be removed to the State having jurisdiction of the crime." (3 Mad. Papers, 1620.)

The only difference in this form from that reported by the Committee on Style, is that the words "to be removed" are substituted for the words "and removed." The provision in this form was made a part of the second section of the fourth article of the Constitution, and as such, was submitted to the people and by them adopted.

Such in brief is the history of this constitutional provision in connection with the Federal Convention. There does not appear to have been any doubt in the Convention as to the propriety of the provision, or any difference of opinion as to the end to be gained. The only question that seems to have elicited any discussion related to the precise language in which the provision should be couched, and as to this point, the Madison Papers, with a single exception, simply give the result attained.

**4. Analysis of the Provision.**—This provision of the Constitution contains, in a germinal form, the elements of all the law, all the judicial decisions, and all the practice which, in relation to the inter-State extradition of fugitive criminals, since the adoption of the Constitution, rests upon its authority. It may be well then in this stage of the inquiry, to subject the language to a brief analysis of its import as follows :

(1.) *The Term "Person."* — The term "person," as here used, means any human being belonging to either sex, and of such age

and mental capacity as to be legally answerable for his or her conduct, whether a citizen or not, of whom the recitals descriptive of such person hold true. These recitals show very clearly that irresponsible infants, lunatics, and idiots, though persons, are not included in the phrase "a person," as here employed. Such persons are not legally capable of committing a crime, and are not dealt with as offenders against the laws of civil society. The provision has no application to them.

(2.) *The Charge.* — The person, here designated, is described as "a person charged." The word "charged," occurring as it does in a constitutional provision to regulate the action of civil society, is undoubtedly used in the limited and technical sense of being *legally* charged or accused — that is to say, charged or accused in some way known to and recognized by law, and charged as the result of some form of investigation provided for by law. It cannot mean less than this. Mere rumor, or hear-say talk, or newspaper clamor cannot constitute a charge in this sense. The charge must have a legal character, according to the well-understood usage and practice of the American people, and must exist under the sanction of law. The precise form of making the charge is not stated; yet its legal character is necessarily implied.

(3.) *The Place of the Charge.* — The place where the charge is made is in some "State" of the Union. The provision uses the words "in any State," as fixing the locality of the charge, meaning thereby some one of the States of the United States. This implies that the person charged was, at the time of doing the thing or things imputed to him by the charge, actually in the State in which the charge is made, and, consequently, subject to its jurisdiction, for the time being at least. If he was not in the State, then he could not in that State do the thing or things alleged in the charge. No State can, within the meaning of this constitutional provision, bring a legal charge against a party who has never been in that State, or who was not there at the time of the action charged, so as to subject him to the process of extradition.

(4.) *The Crime charged.* — The contents of the charge must be "treason, felony, or other crime," committed against the authority of the State in which the accused party is assumed to have been at the time of the offense. These contents will be examined in a subsequent chapter. It is sufficient here to say that the words "treason, felony, or other crime," as construed by the courts, mean all acts that are declared to be crimes by the laws of the State in which the acts are done. The language is confined exclusively to criminal acts, and has nothing to do with absconding debtors or other fugitives, unless they are charged with crimes.

(5.) *The Flight from Justice.* — The party thus charged is described as one "who shall flee from justice." This clearly means that he flees from the justice of the particular State in which the crime is charged to have been committed, and which but for the flight could have arrested him for that offense, without the aid of any other State. He actually goes out of the State to escape from its justice, and hence passes beyond its territorial jurisdiction. If he remains in the State, then he is not a fugitive in the sense of the provision, and, of course, the provision has no application to him. The fact that he thus flees from justice, though no part of the crime charged, is, nevertheless, an essential item in the case, and is always a question of fact to be settled by appropriate evidence.

(6.) *Found in another State.* — Connected with this fact is another fact, assumed to be the sequel thereof; and this is the fact that the accused party, thus fleeing, is "found in another State" of the Union. The order of facts is as follows: The accused party leaves the State in which he is charged with the commission of crime, as the means of escaping from the justice of that State, and takes up his abode, either temporarily or permanently, in another State, and, because he does so, is found there or may be found there. He goes there and remains there, at least for the time being, in order to evade the pursuit of justice; and while there, the jurisdiction of the State against whose laws he is charged with an offense, cannot operate directly upon him. That State cannot arrest and try him in another State. It must

get him back within its own jurisdiction before it can penally deal with him.

(7.) *The Demand.* — These being the facts in a particular case, provision is then made for a demand for the fugitive criminal, by “the executive authority of the State from which he fled.” This executive authority is vested in the Governor of the State; and whether a demand shall be made or not is a question for such authority to determine. The Constitution does not declare the demand to be a duty in any case. It does not command it to be made. If made, then it must be made by the specified authority, and on the basis of the facts set forth in the constitutional provision. No other authority can make the demand, and no authority can make it on any other basis than the one stated. The demand must, of course, be addressed to some competent authority operative in the State to which the fugitive has fled, and in which he is found. The provision itself does not specify this authority, but leaves it to be otherwise determined.

(8.) *The Delivery.* — The demand being made on the basis of the facts specified, and these facts being legally ascertained to exist, then the delivery of the accused party to the authority of the State thus demanding him of the proper authority of the State to which he has fled, and in which he is found, is made an imperative duty. The Constitution says that he “*shall*,” on such demand, “be delivered up.” The duty of the delivery, in the presence of the conditions named, is absolute, and must be performed, or the Constitution will be violated. The question whether these conditions exist in a given case, must, of course, be affirmatively settled; but when they are thus settled, the obligation imposed by the Constitution must be obeyed.

To deliver up the accused party, as required, is forcibly to seize him and take him into custody, and thus make him a prisoner, and then transfer him to an officer or agent of the demanding State authorized to receive him and carry him back to the State from which he fled. The arrest and delivery are to be made in the State to which he fled, and in which he is found. He must be there apprehended and held for the purpose in question; and the State demanding him cannot do this, since no State



can lawfully exercise its power of arrest within the territory of another State.

The Constitution, as already remarked, does not specify the authority by which the party shall be arrested and then "delivered up." Such arrest and delivery must, however, be effected by some competent authority; and this can be furnished only by some law operating in the State to which the party has fled, in which he is found, and of which he is demanded. This law must be enacted by Congress, or by the State itself; and, in either event, the arrest and delivery can be made only under the sanction of law. The Constitution evidently contemplated that a legal authority should and would be furnished for the doing of what it expressly says shall be done, although it does not in terms specify that authority. It plainly did not intend that the delivery should be by the process of kidnapping. ✕

(9.) *The Removal.* — The declared purpose of the arrest and delivery is that the party may "be removed to the State having jurisdiction of the crime." The term "State," as here used, undoubtedly means the State in which the crime was charged to have been committed, from which the party is alleged to have fled, and by whose executive authority he has been demanded. It means the charging and demanding State. That State is the only State that, by the showing of the case, has "jurisdiction of the crime" in question. It cannot, however, practically exercise this jurisdiction, so as to put the party on trial, and if convicted, punish him, until it gets possession of his body. The object of the arrest and delivery provided for is to secure this possession.

It deserves to be noticed that this arrest and delivery have nothing to do with the case beyond the attainment of this one end. The delivering State does not undertake to transport the fugitive "to the State having jurisdiction of the crime." It simply delivers him up to that State by placing him in the custody of some officer or agent thereof authorized to receive him, and carry him as a prisoner to the place of his trial. Whatever else may be done is to be done in and by the State that has thus obtained possession of the fugitive criminal.

"The crime," as here referred to, is the specific offense, charged against the party as a violation of the laws of the demanding

State, which was the basis of the demand, which was set forth in the papers that contained the charge, and for which, upon the showing of these papers, the delivery was made. It is "*the crime*" thus ascertained, coming within the "jurisdiction" of the demanding State, and forming the subject-matter of the extradition proceeding, that the Constitution has in view when it declares that the accused party shall "be delivered up, to be removed to the State having jurisdiction of the crime." The delivery is not on the ground of general criminality, or for *any* criminality, other than that which is specified in the charge of crime. It is for this crime, and this only, that the Constitution requires the delivery to be made; and this more than suggests that the custody thus obtained should be confined to the single purpose of dealing with the offender for this crime, and should not be used for any other purpose.

#### 5. The Provision of the Constitution not Self-Executing.—

Some of the provisions of the Constitution are of such a character that they require no legislation to make them operative. They operate of themselves, without the aid of legislation. Other provisions demand legislation in order to carry them into effect. They imply upon their very face the necessity of such legislation.

The provision relating to the inter-State extradition of fugitive criminals is evidently of the latter character. It contains no statement as to the manner in which the charge of crime shall be made, or as to the evidence necessary to establish the fact that the party accused and demanded has actually fled from justice, or as to the specific authority upon which the demand shall be made, and which must be exercised in ordering the arrest and making the delivery of the fugitive criminal. These are vital points in the process and practice of inter-State extradition; and yet they are not in express terms settled by the Constitution. Hence arises the necessity for legislative action, in order to carry the extradition provision of that instrument into effect.

The Constitution creates an absolute right in the case which it specifies, and, when that case exists, it imposes an absolute duty. The right, on the one hand, and the duty, on the other, are alike a part of the fundamental law of the land, operative in every State and upon every State. The Supreme Court of California,

in *The Matter of Romaine*, 23 Cal. 585, said: "This provision being a part of the supreme law of the land, it is a part of the law of each State; and State officers, whose duty it is to adjudicate and execute the laws, are governed by it the same as by every other law in force."

The provision is to be carried into effect so as, on the one hand, to secure the right which it creates, and, on the other hand, secure the performance of the duty which it imposes; and so far as legislation is necessary to this end, such legislation is a duty. Congress, as will be shown in the next chapter, has legislated on the subject. If it had not done so, it would clearly be the duty of each State to supply the requisite legislation for the delivering up of fugitive criminals when demanded by other States in accordance with the provision of the Constitution; and it is as clearly the duty of each State not so to legislate as to interfere with the proper execution of this provision, or with the law of Congress enacted to make it operative. All such State legislation would be unconstitutional and void.

## CHAPTER II.

## THE LEGISLATION OF CONGRESS.

**1. The Occasion of this Legislation.**— The special circumstances which led Congress to enact a law for the execution of the extradition provision of the Constitution are fully set forth by Mr. J. T. Hoague in a lengthy article published in the *American Law Review*, vol. 13, pp. 181–243. The substance of this statement is the following :

Governor Mifflin, of Pennsylvania, in 1790, addressed a communication to Governor Beverly Randolph, of Virginia, in which he represented that three persons, then in Virginia, had kidnapped a free negro in Pennsylvania, and sold him into slavery in Virginia, and requested their surrender that they might be tried and punished therefor under the laws of Pennsylvania. He accompanied the request with a memorial address to him by The Society for the Promotion of the Abolition of Slavery, giving a history of the case, and also with the copy of an indictment found against these parties, certified by the prothonotary of the court in which the indictment was found.

Governor Randolph, under the advice of the Attorney-General of Virginia, to whom the papers were referred for an opinion as to their character, declined to comply with the request.

The ground taken by the Attorney-General of Virginia was that the act charged was not a crime in Virginia, “similar in character to treason and felony,” but “only a trespass or a breach of the peace,” and was not included in the provision of the Constitution, and the further ground that there could be no surrender of fugitive criminals under the Constitution, until the provision should be supplemented by legislation, defining the manner of carrying it into effect.

Governor Mifflin then sent all the papers to President Washington, including the opinion of the Attorney-General of Virginia. These papers were referred to Mr. Edmund Randolph, the Attorney-General of the United States, who prepared a careful and lengthy opinion upon the whole subject. The President

then submitted the whole matter to Congress for such action as it should deem appropriate. The result was that Congress passed a bill, which, being approved by the President on the 12th of February, 1793, became a law. (1 U. S. Stats. at Large, 302.)

Such, in brief, are the circumstances which led Congress to enact a law for carrying into effect the provision of the Constitution relating to the extradition of fugitive criminals.

**2. The Act of February 12, 1793.** — The first and second sections of this act provided as follows:

“Sec. 1. That whenever the executive authority of any State in the Union, or of either of the Territories North-west or South of the River Ohio, shall demand any person as a fugitive from justice, of the executive authority of any such State or Territory to which such person shall have fled and shall moreover produce a copy of an indictment found, or an affidavit made before a magistrate of any State or Territory as aforesaid, charging the person so demanded with having committed treason, felony, or other crime, certified as authentic by the Governor or Chief Magistrate of the State or Territory from whence the person so charged fled, it shall be the duty of the executive authority of the State or Territory to which such person shall have fled, to cause him or her to be arrested and secured and notice of the arrest to be given to the executive authority making such demand, or to the agent of such authority appointed to receive the fugitive, and to cause the fugitive to be delivered to such agent when he shall appear. But if no such agent shall appear within six months from the time of the arrest, the prisoner may be discharged. And all costs or expenses incurred in the apprehending, securing, and transmitting such fugitive to the State or Territory making such demand shall be paid by such State or Territory.”

“Sec. 2. That any agent, appointed as aforesaid, who shall receive the fugitive into his custody, shall be empowered to transport him or her to the State or Territory from which he or she shall have fled. And if any person or persons shall by force set at liberty or rescue the fugitive from such agent while transporting, as aforesaid, the person or persons so offending shall, on conviction, be fined not exceeding five hundred dollars, and be imprisoned not exceeding one year.”

The other sections of the act, relating to the capture and return of fugitive slaves, have been repealed by Congress, and, since the adoption of the Thirteenth Amendment to the Constitution of the United States, could have no practical operation in this country.

**3. Revised Statutes of the United States.**— The first and second sections of the Act of February 12, 1793, are, with slight modifications, reproduced in the Revised Statutes of the United States, and, as thus reproduced, read as follows :

“Sec. 5278. Whenever the executive authority of any State or Territory demands any person as a fugitive from justice, of the executive authority of any State or Territory to which such person has fled, and produces a copy of an indictment found or an affidavit made before a magistrate of any State or Territory, charging the person demanded with having committed treason, felony, or other crime, certified as authentic by the Governor or Chief Magistrate of the State or Territory from whence the person so charged has fled, it shall be the duty of the executive authority of the State or Territory to which such person has fled to cause him to be arrested and secured, and to cause notice of the arrest to be given to the executive authority making such demand, or to the agent of such authority appointed to receive the fugitive, and to cause the fugitive to be delivered to such agent when he shall appear. If no such agent appears within six months from the time of the arrest, the prisoner may be discharged. All costs or expenses incurred in the apprehending, securing, and transmitting such fugitive to the State or Territory making such demand, shall be paid by such State or Territory.”

“Sec. 5279. Any agent so appointed who receives the fugitive into his custody shall be empowered to transport him to the State or Territory from which he has fled. And every person who, by force, sets at liberty or rescues the fugitive from such agent while so transporting him, shall be fined not more than five hundred dollars, or imprisoned not more than one year.”

**4. General Observations.**— These two sections constitute the whole law of Congress on the subject to which they refer. Their object is to carry into effect the extradition provision of the Constitution. Each particular in these sections, as also in the constitutional provision, will be considered in the ensuing chapters of this part. The following general observations will be sufficient for the purposes of this chapter :

The Constitution, as remarked in the previous chapter, does not define the word “charged,” or tell how the charge of crime shall be made and authenticated. The law of Congress, however, provides that the charge must be made in the form of “an indict-

ment found or an affidavit made before a magistrate of any State or Territory," in which the crime is alleged to have been committed, and that "a copy" of such indictment or affidavit, "certified as authentic by the Governor or Chief Magistrate of the State or Territory from whence the person so charged has fled," shall accompany the demand for the delivery of the party accused. This copy of the indictment or affidavit, certified as prescribed, is the legal evidence of the crime, both as to the fact of its commission and as to its nature.

The charge of the crime, in one or the other of the ways specified, is a condition precedent to any action on the subject by the executive authority of the State or Territory to which the demand is addressed. This charge is not originally made by the demanding executive authority. The form of making it is that of an indictment found by a grand jury or a complaint under oath before a competent magistrate. The mere demand for the arrest and delivery of an alleged fugitive, without the charge of crime made in the manner stated, and without the evidence of such a charge as specified in the law, has no legal efficacy whatever, and hence creates no obligation of delivery. This demand, in order to be effective, must be accompanied with the requisite conditions.

The Constitution, while specifying "the executive authority of the State from which" the party had "fled," as the proper authority to make the demand for his surrender, contains no provision in respect to the authority to which the demand shall be addressed, and upon which shall devolve the duty of causing the fugitive criminal to be "delivered up, to be removed to the State having jurisdiction of the crime." The law of Congress supplies this omission; and inasmuch as the demand proceeds from the executive authority of the State or Territory from which the party fled, Congress judged it expedient to impose the duty of delivery, subject to the conditions specified, upon the executive authority of the State or Territory to which he fled, and in which, as was assumed, he would be found. This removes at least one of the grounds of embarrassment felt by Governor Randolph of Virginia, when, in 1790, he was requested by Governor Mifflin of Pennsylvania to deliver up three fugitive criminals charged with crime in the latter State.

As to the crime charged as the ground of the demand and of the obligation of delivery, the law follows the exact words of the Constitution, specifying "treason, felony, or other crime," without any explanation, qualification, or addition.

The law assumes that, in each case, an agent will be appointed by the demanding authority to receive the fugitive and transport him to the State or Territory from which he fled; and this agent it empowers to discharge this duty, and provides a penalty for any forcible interference with him while engaged in its performance. The expenses of the extradition process are to be paid by the State or Territory making the demand.

Such then, in general terms, is the law enacted by Congress to give effect to the extradition provision of the Constitution. The main thing done by the law, in addition to what appears in the Constitution, is to assign the duty of arresting and delivering up fugitive criminals to the Governors of States and Territories, and to define the manner in which the charge of crime shall be made and authenticated.

**5. The Constitutionality of the Law.**—The Act of February 12, 1793, in *Prigg v. The Commonwealth of Pennsylvania*, 16 Pet. 539, came under the consideration of the Supreme Court of the United States, especially with reference to the two sections that provided for the rendition of fugitive slaves. The court, in the opinion delivered by Mr. Justice Story, stated a principle of construction under which it affirmed the constitutionality of the act, in application alike to fugitive criminals and fugitive slaves. This principle is as follows:

"No one has ever supposed that Congress could constitutionally, by its legislation, exercise powers or enact laws beyond the powers delegated to it by the Constitution. But it has, on various occasions, exercised powers which were necessary and proper as means to carry into effect rights expressly given and duties expressly enjoined thereby. The end being required, it has been deemed a just and necessary implication that the means to accomplish it are given also, or, in other words, that the power follows as a necessary means to accomplish the end."

This was said in answer to the objection that power to pass the act in question had not been given to Congress by any express



grant. The Constitution, for example, provides that representatives in Congress shall be apportioned among the several States according to their respective numbers, but nowhere, in express terms, gives to Congress the power to make such an apportionment. This power is, however, implied as necessary to the end. The principle of construction assumed is that when the Constitution specifies an end to be attained, but does not expressly designate the agency or means thereof, Congress is, by necessary implication, authorized to provide such agency or means by legislative action.

It was on this ground that the act in question was declared to be constitutional in both of its applications. Speaking of that part of the act which relates to the extradition of fugitives from justice, Mr. Justice Story said: "From that time [1793] down to the present hour not a doubt has been breathed upon the constitutionality of this part of the act, and every executive in the Union has constantly acted upon and admitted its validity." He added:

"We hold the act to be clearly constitutional in all its leading provisions, and indeed, with the exception of that part which confers authority upon State magistrates, to be free from reasonable doubt and difficulty upon the grounds stated. As to the authority so conferred upon State magistrates, while a difference of opinion has existed, and may still exist on the point, in different States, whether State magistrates are bound to act under it, none is entertained by this court that State magistrates may, if they choose, exercise that authority, unless prohibited by State legislation."

The act, as Mr. Justice Story remarked, covers "the whole ground of the Constitution, both as to fugitives from justice and fugitive slaves," not that it exhausted all the power of Congress on the subjects referred to, but that it was such as Congress had deemed expedient for the attainment of the ends sought. If State Governors should, by refusal to deliver up fugitive criminals, defeat the operation of the law it would be competent for Congress to provide some other means of attaining the end. This is implied in the language of Mr. Justice Story, and expressly stated by the court in *The Matter of Voorhees*, 3 Vroom, 146.

It must then be assumed, in all our reasoning upon the subject,

that the law of Congress for the execution of the extradition provision of the Constitution is within the limits of the legislative power of Congress. Such is the settled doctrine of the courts, both State and Federal, and upon this assumption the Governors of States have uniformly acted.

The peculiarity of the law, that distinguishes it from the usual legislation of Congress, consists in the fact that it undertakes on this subject to define the duty of a State Governor, who is not an officer of the Federal Government, and does not hold his office and is not elected to that office, and cannot be removed from the same, under any laws which Congress has enacted or has the power to enact. The Governor of a State is purely a State officer and cannot be made an officer of the United States, within the meaning of the Constitution, by the legislative action of Congress.

**6. Power to enforce the Law.** — The Supreme Court of the United States, in *Kentucky v. Dennison*, 24 How. 66, held that the words "It shall be the duty," etc., as occurring in the act of Congress on this subject, are not "mandatory and compulsory" in the sense of implying any power in the General Government, either through the judiciary or any other department of that Government, to coerce obedience to the law or punish disobedience, when applied to the Governor of a State, and that these words are simply declaratory of the "moral duty" imposed by the Constitution when Congress has provided this mode of giving effect to the extradition provision of that instrument. The court, on this ground, declined to issue a *mandamus* to Governor Dennison requiring him to comply with the requisition of the Governor of Kentucky.

The same doctrine was stated in *Taylor v. Taintor*, 16 Wall. 366. "If he [the Governor] refuse," said Mr. Justice Swayne. "there is no means of compulsion."

It necessarily follows that this law, considered as a rule to control the action of State Governors, is not a law in the sense of being enforceable upon them by any compulsory agency which Congress is authorized to establish. It is armed with no penalty for disobedience, and no Federal court can compel a State Governor to obey it. It confers an authority to be exercised, and

for this purpose is a law, without any means of compelling the exercise, or punishing a refusal to obey it.

It does not, however, follow that State Governors should not strictly comply with the rule on this subject prescribed by Congress. That rule is a part of the supreme law of the land ; and Congress had the power to establish it as such, and thereby to annex a specific duty to the office of a State Governor. The object of the rule is to secure the proper execution of the constitutional provision on which it is based. There is no legal process by which a member of Congress can be compelled to obey and support the Constitution of the United States ; and yet he is not the less bound by it as the supreme civil rule of his action. And so a State Governor, having attached to his office a specific duty by a valid law of Congress, is bound to perform that duty according to the requirements of the law ; and the mere fact that there is no Federal agency that can compel such performance, or punish non-performance, does not in the slightest degree impair the obligation.

**7. Application to Territories.** — No express provision is contained in the Constitution for any extradition to or from the Territories of the United States ; and yet the law of Congress includes them, and, for this purpose, makes no distinction between them and the several States. The remedy in both cases is precisely the same.

It was urged, in *The State v. Loper*, Ga. Decis., Part II, 33, that this feature of the law is unconstitutional, since a Territory is not a State, and the latter only is named in the extradition provision of the Constitution. The court declined to express an opinion on the point, inasmuch as it was not deemed necessary to a decision of the case before the court.

In *The Matter of Romaine*, 23 Cal. 585, the court remarked : " The clause [in the Constitution] applies only to criminals fleeing from one State to another, and does not in express terms apply to those fleeing from a Territory to a State, which is the case now under consideration. The case is not directly provided for by the National Constitution, and we are, therefore, compelled to look elsewhere for the power to return the parties before us." These parties had been arrested under a warrant issued by the

Governor of California, upon a requisition made by the Governor of the Territory of Idaho; and the court held the arrest to be legal under the laws of that State.

Mr. Justice Story, in *Prigg v. The Commonwealth of Pennsylvania*, 16 Pet. 539, said: "We hold the act [of 1793] to be clearly constitutional in all its leading provisions, and, indeed, with the exception of that part which confers authority upon State magistrates, to be free from reasonable doubt and difficulty upon the grounds stated." This opinion includes Territories as well as States within its scope.

Judge Parker, in *Ex parte Morgan*, 20 Fed. Rep. 298, remarked: "If Congress deems it a useful rule or regulation, relating to the Territories of the Union, to extradite their fugitive criminals, it has the power to pass such a rule, not, perhaps, under the extradition clause of that instrument [the Constitution], but under the clause relating to the Territories; and this rule is binding on the States, and to be observed and obeyed by them. I believe, therefore, that this part of the act of Congress is valid, and the obligation to obey it, on the part of the Governors of the respective States, is as binding as when the demand for extradition is made by the Governor of a State."

Congress has power, by the express terms of the Constitution, to make "all needful rules and regulations" in respect to the Territories of the United States; and this obviously implies the power to enact an extradition law as between these Territories, and as between a State and a Territory when the demand proceeds from the former, if not when it proceeds from the latter. The spirit of the Constitution, though not its express letter, embraces Territories in the extradition principle. The reason for extradition in respect to States and Territories is one and the same. There is no instance, so far as we are aware, in which the application of extradition to the Territories of the United States, as provided for by the law of Congress, has been judicially declared to be unconstitutional.

**8. The District of Columbia.** — The act of 1793 said nothing about extradition to or from the District of Columbia; and no express provision for such extradition is made in the Constitution. This District is not a State; and yet it is important for the in-

terests of public justice that criminals, fleeing to or from this District, should not thereby secure immunity from punishment.

Congress by the sixth section of the Act of March 3, 1801 (2 U. S. Stat. at Large, 115), legislated on this subject. This legislation, as reproduced in section 843 of the Revised Statutes of the United States relating to the District of Columbia, reads as follows:

“In all cases where the laws of the United States provide that fugitives from justice shall be delivered up, the Chief Justice of the Supreme Court shall cause to be apprehended and delivered up such fugitive from justice who shall be found within the District, in the same manner and under the same regulations as the executive authority of the several States are required to do by the provisions of sections 5278 and 5279, Title LXVI, of the Revised Statutes, *Extradition*, and all executive and judicial officers are required to obey the lawful precepts or other process issued for that purpose, and to aid and assist in such delivery.”

This section provides for the extradition of fugitive criminals from the District of Columbia, and as to the manner and regulations thereof, adopts the laws applicable in cases of inter-State extradition, with the exception that the Chief Justice of the Supreme Court of the District is to cause the party to be apprehended and delivered up. Any State or Territory may therefore, by compliance with the laws of the United States on this subject, procure the extradition of a fugitive criminal from this District.

There can be no doubt about the power of Congress thus to legislate, since the Constitution gives to it the power of “exclusive legislation” in the District of Columbia.

How then does the case stand where the offense is committed in the District of Columbia, and the offender flees to some State or Territory within the United States? In such a case the offense is against the laws of the United States, and if the offender be found without the District, can he be brought back there for trial and punishment?

Judge Dillon, in *In re Buell*, 3 Dill. 116, held that “for a criminal offense, committed within the District of Columbia, the offender, if found beyond the District, may be removed to the District for trial,” and referred to section 1014 of the Revised Statutes of the United States, in connection with the Act of June

22, 1874, for the authority. He remarked: "The District of Columbia is not a sanctuary to which persons commuting offenses against the United States may fly and be beyond the reach of justice, nor is the law so defective that persons there committing such offenses and escaping or found elsewhere cannot be taken back there for trial."

Section 1014 of the Revised Statutes of the United States provides as follows:

"For any crime or offense against the United States, the offender may by any Justice or Judge of the United States, or by any Commissioner of a Circuit Court to take bail, or by any Chancellor, Judge of a Supreme or Superior Court, Chief or first Judge of Common Pleas, Mayor of a city, Justice of the Peace, or other magistrate, of any State where he may be found, and agreeably to the usual mode of process against offenders in such State, and at the expense of the United States, be arrested and imprisoned, or bailed, as the case may be, for trial before such court of the United States as by law has cognizance of the offense. Copies of the process shall be returned as speedily as may be into the clerk's office of such court, together with the recognizances of the witnesses for their appearance to testify in the case. And where any offender or witness is committed in any district other than that where the offense is to be tried, it shall be the duty of the Judge of the district where such offender or witness is imprisoned, seasonably to issue, and of the Marshal to execute a warrant for his removal to the district where the trial is to be had."

The act of June 22, 1874 (18 U. S. Stat. at Large, 193), provides as follows:

"Sec. 1. That the Criminal Court of the District of Columbia shall have jurisdiction of all crimes and misdemeanors committed in said District, not lawfully triable in any other court, and which are required by law to be prosecuted by indictment or information."

"Sec. 2. That the provisions of the thirty-third section of the Judiciary Act of 1789 shall apply to courts created by act of Congress in the District of Columbia."

The section of the Judiciary Act, here referred to, is the basis of section 1014 of the Revised Statutes of the United States, as

quoted above. The result of this legislation is that a person who in the District of Columbia commits an offense against the laws of the United States, and then departs therefrom, or is found elsewhere, may be arrested and taken into custody where he is found, and then be carried back to that District for trial. This, though not inter-State extradition, removes the party to the place where the offense was committed, and in effect is practically the same thing.

In *The Matter of Charles Dana*, 7 Ben. 1, it appeared that an information was filed in the Police Court of the District of Columbia charging Dana with a libel committed in that District, and that a warrant was issued for his arrest, but that he could not be found in the District, being in the city of New York. On a complaint made before a Commissioner of the United States in the city of New York, a warrant was issued by the Commissioner for the arrest of Dana, and he was committed, and then an application was made to Judge Blatchford, the District Judge, for a warrant to remove him to the District of Columbia for trial on the information there made against him.

Judge Blatchford refused to issue the warrant for Dana's removal. The ground of the refusal was that so much of the Act of June 17, 1870 (16 U. S. Stat. at Large, 153), establishing a Police Court in the District of Columbia, as provides for a trial of the information in this case by the court without a jury, is repugnant to the provisions of the Constitution relating to trials in criminal cases. The Judge said: "As, therefore, the defendant, if removed to the District of Columbia, will be tried in a manner forbidden by the Constitution, I must decline to grant the warrant."

## CHAPTER III.

## STATE LEGISLATION.

The clause of the Constitution relating to the extradition of fugitive criminals, and the law of Congress for carrying that clause into effect, are the supreme law of the land on that subject. No State legislation in relation to the same subject, that is inconsistent with this law, or adapted to interfere with or defeat its operation, can have any constitutional validity.

Several questions then arise in respect to State legislation and State action on the subject of extradition. Does the Constitution or the law of Congress exclude all such legislation? If not, what are the limits within which the latter must move? What laws, if any, have been enacted by the States on this subject? Is it competent for State magistrates, having the general power to issue warrants of arrest on criminal complaints, to issue such warrants in the case of fugitive criminals, either with or without special authority given to them by statute? These are the questions that will be considered in this chapter.

**1. Preliminary Supposition.** — Let it be supposed in the outset that Congress had not legislated at all upon the subject, and, consequently, that the provision of the Constitution stood alone by itself. Would this provision of itself exclude all State legislation, so that State laws enacted for the purpose of carrying it into effect would be unconstitutional?

There certainly is nothing in the language of the provision to involve or imply any such result. What the provision declares is that criminals, fleeing from one State to another, being charged with crime, and demanded by the executive authority of the State from which they fled, shall "be delivered up, to be removed to the State having jurisdiction of the crime." If a State, in the absence of any legislation by Congress, should undertake to perform the duty here imposed, and should provide therefor by law, it would be simply doing what the Constitution says shall be done, and does not say shall be done exclusively by Congress. It



is difficult to see how such State legislation, in the case supposed, would be unconstitutional. The provision of the Constitution is not a prohibition upon State authority, but a positive mandate in respect to a duty to be performed, without any express statement as to the agency of the performance. There is nothing in it that excludes this agency from the several States.

Nor is there any provision elsewhere in the Constitution to sustain such an exclusion. There are some things which the States are in express terms forbidden to do; and there are others in which the prohibition is in the form of necessary implication. The execution of the extradition provision of the Constitution by State authority, and by State laws, in the absence of any legislation by Congress on the subject, does not belong to either of these categories.

The provision itself is borrowed, in almost identical words, from the corresponding provision in the Articles of Confederation, under which, beyond all question, the execution was to be by State authority and State laws. Chief Justice Taney, in *Kentucky v. Dennison*, 24 How. 66, reasoning from this fact, said: "It is plain that the mode of the demand and the official authority by and to whom it was addressed, under the Confederation, must have been in the minds of the members of the Convention when this article was introduced, and that in adopting the same words, they manifestly intended to sanction the mode of proceeding practiced under the Confederation — that is, of demanding the fugitive from the executive authority, and making it his duty to cause him to be delivered up."

If so, then, in the event of no legislation by Congress, the States would, in passing laws for the execution of the provision, be doing exactly what was intended. The obvious conclusion is that the States, unless the legislation of Congress excludes them therefrom, may still legislate on the subject, provided that such legislation is not inconsistent with that of Congress. The constitutional provision was, in *Hibbler v. The State*, 43 Tex. 197, spoken of as in the nature of "a treaty stipulation between the States of the Union," as binding upon the States as though it was a part of the constitution of each State.

The Supreme Court of California, in *The Matter of Romaine*, 23 Cal. 585, characterized the provision as "a solemn compact

between the States, to be enforced by State legislation or by judicial action." The court spoke of the provision as "a part of the supreme law of the land," and "a part of the law of each State." This clearly supposes that the States may execute the provision, and that they may legislate for this purpose, although they have no authority so to legislate as to interfere with the law of Congress on the subject.

**2. Opportunity for State Legislation.** — If we carefully examine the Constitution and the law of Congress we shall find several phases of the question, not provided for by either, which leave an opportunity for the interposition of State laws, subject to the qualification that such laws must be consistent with the supreme law of the land. Take the following examples :

(1.) Neither the Constitution nor the law of Congress has any application to the case of a fugitive criminal, until a demand has been made for his delivery by the executive authority of the State or Territory from which he fled. Neither imposes this demand as a duty upon such executive authority, and neither supplies any rule by which to determine whether the demand shall be made or not. Both leave this question to the discretion of the demanding authority. State laws simply regulating the exercise of this discretion are plainly not inconsistent with the Constitution or the law of Congress, since they operate upon the case *before* it comes within the purview of the latter at all, and furnish a rule to guide the executive authority at a point where the latter are wholly silent.

(2.) Neither the Constitution nor the law of Congress prescribes the precise practice or mode of procedure in securing the arrest of the person demanded and making his delivery to the demanding State or Territory. The Constitution says nothing on the subject; and the law of Congress simply says that the executive authority shall cause the party "to be arrested and secured," and then delivered to the agent of the demanding executive. How shall this be done? What is the precise procedure for doing it? State laws defining the method of gaining the end, if naturally and properly adapted to secure that end, are very plainly not inconsistent with the Constitution or the law of Con-

gress. (*Ex parte Ammons*, 34 Ohio St. 518; *Coffman v. Keightly*, 24 Ind. 509; and *Mohr's Case*, 2 Alabama Law Journal, 457.)

(3.) The law of Congress, as decided by the Supreme Court of the United States, in *Kentucky v. Dennison*, 24 How. 66, is not "mandatory and compulsory" upon the Governor of a State to whom a demand is addressed, but simply declaratory of his "moral duty" to comply with the demand when the specified conditions are present. A State law enforcing the performance of this duty would not be in conflict with the law of Congress.

(4.) Both the Constitution and the law describe the person to be delivered up as one who has fled from the State demanding him and to the State of which he is demanded; and yet neither, in express terms, specifies the evidence upon which this material fact in the case shall be made known, either to the executive authority making the demand, or to the executive authority asked to make the delivery. If this fact is not by legal evidence shown to be in the case, then there is no authority for either the demand or the delivery. The law of Congress states how the charge of crime shall be made; but it gives no rule for ascertaining whether the accused party is, in the sense of the Constitution, a fugitive from justice or not.

A State law prescribing the evidence upon which this material fact shall be shown, and thereby regulating the discretion of the executive authority alike in demanding and delivering up fugitive criminals, provided it be of a character not to defeat the purpose of the Constitution, would not be inconsistent with that Constitution, or with the law of Congress. It would deal with a question which the executive authority must consider and determine, but in respect to which neither the Constitution nor the law of Congress prescribes any rule for his guidance.

(5.) There is no provision, in the Constitution or the law of Congress, to determine how the question of *identity*, if raised, shall be settled; and hence a proper State law to secure this end would not be in conflict with either.

(6.) Neither the Constitution nor the law of Congress for its execution furnishes any regulation in respect to the writ of *habeas corpus* in extradition cases; and proper State laws on this subject are not only within the sphere of State power, but are not incon-

sistent with the constitutional provision or with the law of Congress enacted to carry it into effect. . .

(7.) The law of Congress provides for the arrest of an accused party only by the executive authority of a State or Territory, and then only *after* a demand for his delivery has been duly made. A State law giving to judicial magistrates the authority, upon proper evidence, to order an arrest *before* the demand is made, and to hold the party in custody until, by the proper steps, the law of Congress can be brought into action for his delivery, not only acts before the latter acts at all, but it acts in a way to promote the very end sought to be attained by the latter. The whole effect of such a law is auxiliary, and not antagonistical in any sense, to the law of Congress; and surely it cannot be deemed in conflict with the Constitution or the law of Congress.

These particulars are sufficient to show that State legislation, is not necessarily excluded from the inter-State extradition of fugitive criminals. There is an opportunity for it. Neither the Constitution nor the legislation of Congress so covers and exhausts the subject as to exclude such legislation. The legislation must, of course, be consistent with both; but where there is no inconsistency between State legislation and the Constitution and the law of Congress, there is no good reason for regarding the former as excluded by the latter.

**3. The Language of the Supreme Court of the United States.**— Mr. Justice Story in stating the opinion of the Supreme Court of the United States, in *Prigg v. The Commonwealth of Pennsylvania*, 16 Pet. 539, used the following language:

“If Congress have a constitutional power to regulate a particular subject, and they do actually regulate it in a given manner, and in a certain form, it cannot be that the State Legislatures have a right to interfere, and, as it were, by way of complement to the legislation of Congress, to prescribe additional regulations, and what they deem auxiliary provisions for the same purpose. In such a case, the legislation of Congress, in what it does not prescribe, manifestly indicates that it does not intend that there shall be any further legislation to act upon the subject-matter. Its silence as to what it does not do is as expressive of what its intention is as the direct provisions made by it. This doctrine was fully recognized by this court, in the case of *Houston v. Moore*, 5

Wheat. 1, 21, 22, where it was expressly held that, when Congress have exercised a power over a particular subject given them by the Constitution, it is not competent for State legislation to add to the provisions of Congress on that subject; for that the will of Congress upon the whole subject is as clearly established by what it had not declared as by what it has expressed."

The Supreme Court of New York State, in *Jack v. Martin*, 12 Wend. 311, which was a fugitive slave case, adopted the doctrine here stated. The language, however, has not been understood by State legislatures, or generally by State courts, as excluding all State legislation on the subject of inter-State extradition. As a matter of fact, the States have legislated on the subject; and in repeated instances State courts have treated the legislation as valid.

The Supreme Court of Ohio, in *Ex parte Ammons*, 34 Ohio St. 518, referring to the Act of March 3, 1875, said: "Admitting that it is not within the power of the State legislature to make provisions in conflict with the laws of Congress on the subject, it is quite clear that State legislation in aid of Congressional enactments is not objectionable. \* \* \* The means by which the fugitive is to be arrested and secured are not provided by the act of Congress; hence the legislation of a State may and should provide proper and adequate means and facilities for the accomplishment of such extradition."

The Supreme Court of Alabama, in *Mohr's Case*, 2 Alabama Law Journal, 457, referring to the subject in the light of the language used by Mr. Justice Story, as quoted above, said: "It now seems to be the better opinion that where State laws on this subject are not repugnant, but auxiliary, to those passed by Congress, they may be upheld upon the principle of the right to exercise the power of domestic police."

State legislation, inconsistent with that of Congress, is, of course, excluded. But that State legislatures, as remarked by Mr. Hurd, "may not by statute enforce the performance of the duty it [the act of Congress] enjoins upon their executives by subjecting them to a State liability for neglecting it, or otherwise facilitate the discharge of the constitutional obligation, are questions which ought not to be considered as altogether foreclosed by the rule

applicable in cases not identical." (Hurd's Habeas Corpus, 2d ed., 636.)

It should be borne in mind that the actual case before the Supreme Court, in *Prigg v. The Commonwealth of Pennsylvania*, *supra*, related to State legislation in respect to fugitive slaves, and that what was said in regard to fugitives from justice was said only incidentally, "by way of analogy and illustration." The latter subject, differing in many respects from the former, was not really involved in the case at all, and all reference to it might have been omitted. No positive decision was made in regard to it. It was simply alluded to in the deliverance of Mr. Justice Story.

Moreover, neither the Constitution nor the law of Congress confers any cognizance of the case of a fugitive criminal until a demand has been made for his delivery. This demand is the initial point at which both begin to operate; and, prior to such demand, neither, by its own terms, has any application to the case. Legislation, by the States, relating to the case in advance of this demand, does not deal with the subject-matter with which the legislation of Congress deals; and if the former does not interfere with the operations of the latter, and especially if it be designed and adapted to facilitate the same end, there can be no good reason for regarding it as being excluded by the legislation of Congress. State legislatures have, as the sequel will show, assumed that they might constitutionally legislate on the subject.

**4. The Laws of Massachusetts.** — The General Statutes of Massachusetts, in chapter 177, provide as follows on this subject:

"Sec. 1. The Governor of this State, in any case authorized by the Constitution and laws of the United States, may, on demand, deliver over to the executive of any other State or Territory any person charged therein with treason, felony, or other crime; or may, on application, appoint an agent to demand of the executive authority of any other State or Territory any such offender fleeing from the justice of this State; *Provided*, That such demand or application is accompanied by sworn evidence that the party charged is a fugitive from justice, and by a duly attested copy of an indictment, or a duly attested copy of a complaint before a court or magistrate authorized to receive the same; such com-

plaint to be accompanied by affidavits to the facts constituting the offense charged, by persons having actual knowledge thereof, and such further evidence in support thereof as the Governor may require."

"Sec. 2. When such demand or application is made, the Attorney-General or other prosecuting officer shall, if the Governor requires it, forthwith investigate the grounds thereof, and report to the Governor all the material facts which may come to his knowledge, with an abstract of the evidence in the case, and especially in case of a person demanded, whether he is held in custody, or is under recognizance to answer for an offense against the laws of this State, or of the United States, or by force of any civil process, with an opinion as to the legality or expediency of complying therewith."

"Sec. 3. If the Governor is satisfied that the demand is conformable to law and ought to be complied with, he shall issue his warrant, under the seal of the Commonwealth, to some officer authorized to serve warrants in criminal cases, directing him at the expense of the agent making the demand, at a time designated in the warrant, to take and transport such person to the line of this State, and there deliver him over to such agent, and such officer may require aid as in criminal cases."

"Sec. 4. No person arrested upon such warrant shall be delivered over to such agent of a State or Territory, until he has been notified of the demand for his surrender and had opportunity to apply for a writ of *habeas corpus*, if he claims such right of the officer making the arrest. And when such writ is applied for, notice thereof, and of the time and place of hearing thereon, shall be given to the Attorney-General or other prosecuting officer for the district in which the arrest is made."

"Sec. 5. An officer who delivers over to such agent for extradition any person in his custody upon such warrant, without having complied with the provisions of the preceding section, shall forfeit a sum not exceeding one thousand dollars."

"Sec. 6. If the application for the arrest of a fugitive from the justice of the State is complied with, and an agent appointed, his account shall be audited and paid by the State."

"Sec. 7. When a person is found in this State charged with an offense committed in another State or Territory, and liable by the Constitution and laws of the United States to be delivered over upon the demand of the executive authority of such other State or Territory, any court or magistrate authorized to issue warrants in criminal cases, may, upon complaint under oath setting forth the offense and such other matters as are necessary to bring the case within the provisions of law, issue a warrant to bring the person charged before the same or some other court or magistrate within the State, to answer to such complaint as in other cases."

"Sec. 8. If upon the examination of the person charged it appears to the court or magistrate, that there is reasonable cause to believe that the complaint is true, and that such person may be lawfully demanded of the executive, he shall, if not charged with a capital crime, be required to recognize with sufficient sureties in a reasonable sum to appear before such court or magistrate at a future day (allowing a reasonable time to obtain the warrant of the executive), and to abide the order of the court or magistrate."

"Sec. 9. If such person does not so recognize, he shall be committed to prison and there be detained until such day, in like manner as if the offense charged had been committed within this State, and if the person recognizing fails to appear according to the condition of his recognizance, he shall be defaulted, and like proceedings shall be had as in case of other recognizances entered into before such court or magistrate. If the person is charged with a capital crime, he shall be committed to prison and there be detained until the day so appointed for his appearance."

"Sec. 10. If the person so recognized or committed appears before the court or magistrate upon the day ordered, he shall be discharged unless he is demanded by some person authorized by the warrant of the executive to receive him, or unless the court or magistrate sees cause to commit him, or to require him to recognize anew for his appearance on some other day, and if when ordered he does not so recognize, he shall be committed and detained as before: *Provided*, That whether the person charged is recognized, committed, or discharged, any person authorized by the warrant of the executive may at all times take him into custody, and the same shall be a discharge of the recognizance, and not be deemed an escape."

"Sec. 11. The complainant in such case shall be answerable for all actual costs and charges, and the support in prison of any person so committed, to be paid in like manner as by a creditor for his debtor committed on execution. If the charge for support in prison is not so paid, the jailer may discharge such person in like manner as if he had been committed on an execution."

The first six of the above sections relate to the case, "authorized by the Constitution and laws of the United States," in which a demand for a fugitive criminal is addressed to the Governor of Massachusetts by the executive authority of some other State or Territory, or in which an application is made to the Governor to address such a demand to the executive authority of some other State or Territory. The first section authorizes the Governor, in such a case, to comply with the demand, or to appoint an agent to



make a demand on the Governor of some other State or Territory. This plainly is not in conflict with the law of Congress.

The proviso in this section requires that the demand or application shall be "accompanied by sworn evidence that the party charged is a fugitive from justice." This requirement is not inconsistent with the law of Congress, since that law nowhere prescribes how the fact that the party is a fugitive shall be established. (*Mohr's Case*, 2 Alabama Law Journal, 457; *Jackson's Case*, 2 Flipp. 183.) It simply provides a rule where Congress has given no rule. It certainly was not the intention of Congress that the accused party should be demanded and delivered up, in the absence of any legal evidence showing him to be a fugitive. The requirement of such evidence to this effect is a reasonable provision.

The same proviso also requires that the demand or application shall be accompanied "by a duly attested copy of an indictment, or a duly attested copy of a complaint made before a court or magistrate authorized to receive the same." This language, though not precisely the same as that used in the law of Congress, undoubtedly refers to it, and conveys essentially the same ideas, and is in entire harmony with the requirements of that law.

It is also required in the proviso of the same section that when the charge of crime is in the form of a complaint, which means an affidavit before a court or magistrate charging the crime, the complaint shall "be accompanied by affidavits to the facts constituting the offense charged, by persons having actual knowledge thereof, and such further evidence in support thereof as the Governor may require." The laws of Ohio contain a similar provision, and the comments thereon in both cases will be found in the sequel.

The examination of the case by the Attorney-General, at the request of the Governor, and his report of the facts and his opinion in regard to the same, as provided for in the second section, are simply designed to aid the Governor in arriving at a correct conclusion, whether in demanding or delivering up fugitive criminals. There is nothing in the law of Congress that excludes the employment of such means. Whether they shall be employed or not is left to the Governor's discretion; and he would have such a discretion, even without the law.

The third, fourth and fifth sections relate to the procedure in making the arrest and delivery where the Governor, after examining the case, "is satisfied that the demand is conformable to law and ought to be complied with;" and this surely is in no sense inconsistent with the law of Congress. Nor is the sixth section inconsistent with that law, since it has nothing to do with any matter involved therein.

The next five sections of the same chapter give to the judicial tribunals of that State the authority to order a preliminary arrest and detention of a person charged with crime in another State or Territory, before the demand has been made and before the issue of a warrant of arrest and delivery by the Governor of the State, and in order that under such warrant, if it shall be issued, he may be arrested and delivered up to the demanding State or Territory. There can be no constitutional objection to this legislation, since it operates upon the case before the law of Congress has any application to it, and is, moreover, designed and adapted to facilitate the end sought by that law.

The seventh section was formerly section 8 of chapter 142 of the Revised Statutes of Massachusetts, and, as such, came, in *The Commonwealth v. Tracey*, 5 Metc. 536, under the consideration of the Supreme Court of that State, with reference to the question of its constitutionality, especially in view of the doctrine stated by Mr. Justice Story in *Prigg v. The Commonwealth of Pennsylvania*, 16 Pet. 539. Chief Justice Shaw, in delivering the opinion of the court, said: "It is a provision obviously not repugnant to the Constitution and laws of the United States, nor tending to impair the rights or relax the duties intended to be secured by them. To this extent, therefore, the court are of opinion that this law is constitutional and valid, one that the legislature had authority to pass." The Chief Justice also said:

"A wise Government, bound to maintain peace and good order within its territories, and authorized to exercise a salutary vigilance and restraint over all persons within its jurisdiction, may well provide for arresting such persons [fugitive criminals], and subjecting them to a judicial examination, and requiring them to give bail for their appearance and good behavior, or be imprisoned, if they be found to have committed capital offenses in other States, until due inquiry can be made, and all persons injured by

them have an opportunity to institute such proceedings, civil or criminal, as justice may require."

This general doctrine, as to the police power of a State to arrest and hold fugitive criminals, was presented with direct reference to the fact that a person, charged with larceny in Virginia, had been arrested under the law of Massachusetts, prior to any requisition for his delivery from the Governor of the former State. The court held the arrest to be lawful, and the law under which it was made to be within the power of the legislature.

So also sections second and third of the same Statutes, reproducing, for substance, section seventh of chapter 142 of the Revised Statutes, were considered by the same court in *The Commonwealth v. Hall*, 75 Mass. 262. Judge Bigelow, in stating the opinion of the court, said: "The provision of the Rev. Stat. ch. 142, sec. 7. authorizing the Governor to issue his warrant for the apprehension of the fugitive, was, therefore, in accordance with the act of Congress, and, being intended to aid in the enforcement of that law, and not being repugnant to any provision in the State Constitution, is not open to the objections urged by the prosecution." This affirms the validity of the State legislation in question.

5. **Laws of New York.** — Title IV, chapter I, of the Criminal Code of the State of New York, enacted in 1881, relates to fugitives from justice, and is for the most part a reproduction, in a condensed form, of the provisions of the Act of the Legislature of that State, passed May 6, 1839. (5 Edmunds' Statutes at Large, 167.) The following are the provisions on this subject as contained in this Title:

"Sec. 827. A person charged in any State or Territory of the United States with treason, felony or other crime, who shall flee from justice and be found in this State, must, on demand of the executive authority of the State or Territory from which he fled, be delivered up by the Governor of this State, to be removed to the State or Territory having jurisdiction of the crime."

"Sec. 828. A magistrate may issue a warrant for the apprehension of a person so charged, who shall flee from justice and be found within this State."

"Sec. 829. The proceedings for the arrest and commitment of the person charged are in all respects similar to those provided in this Code, for the arrest and commitment of a person charged with a public offense committed in this State; except that an exemplified copy of an indictment found, or other judicial proceeding had against him, in the State or Territory in which he is charged to have committed the offense, may be received as evidence before the magistrate."

"Sec. 830. If, from the examination, it appear that the person charged has committed the crime alleged, the magistrate, by warrant reciting the accusation, must commit him to the proper custody in his county, for a time specified in the warrant, which the magistrate deems reasonable, to enable the arrest of the fugitive under the warrant of the executive of this State, on the requisition of the executive authority of the State or Territory in which he committed the offense, unless he give bail as provided in the next section, or until he be legally discharged."

"Sec. 831. A Judge of the Supreme Court may admit the person arrested to bail, by an undertaking, with sufficient sureties and in such sum as he deems proper, for his appearance before him at a time specified in the undertaking, and for his surrender to be arrested upon the warrant of the Governor of this State."

"Sec. 832. Immediately upon the arrest of the person charged, the magistrate must give notice to the district attorney of the county, of the name of the person and the cause of his arrest."

"Sec. 833. The district attorney must immediately thereafter give notice to the executive authority of the State or Territory, or to the prosecuting attorney or presiding judge of the criminal court of the city or county therein, having jurisdiction of the offense, to the end that a demand may be made for the arrest and surrender of the person charged."

"Sec. 834. The person arrested must be discharged from custody or bail, unless before the expiration of the time designated in the warrant or undertaking, he be arrested under the warrant of the Governor of this State."

"Sec. 835. The magistrate must return his proceedings to the Court of Sessions of the county, which must thereupon inquire into the cause of the arrest and detention of the person charged; and if he be in custody, or the time for his arrest have not elapsed, it may discharge him from detention, or may order his undertaking of bail to be canceled, or continue his detention for a longer time, or readmit him to bail, to appear and surrender himself within the time specified in the undertaking."

The first of the above sections is the only one of the whole number that relates to the case after a requisition has been addressed to the Governor of New York for the delivery of a fugitive criminal; and this simply requires the Governor to make the delivery, as provided for by the act of Congress, without any direction as to the mode of procedure.

All the other sections deal with the subject prior to such requisition, and provide a series of regulations for a preliminary arrest and detention of the accused party by judicial magistrates, with a view to his delivery by the warrant of the Governor, if one shall be issued, upon the demand of the executive authority of another State or Territory. These provisions are auxiliary to the attainment of the end provided for by the Constitution and the law of Congress.

In *The Matter of Heyward*, 1 Sandf. 701, coming before the New York Superior Court at chambers, in 1848, Judge Sandford, after adverting to the act of May 6, 1839, remarked: "It appears that before a magistrate issues his warrant for the arrest of a fugitive from justice from another State, there must be a complaint taken on oath before such magistrate, and it must show three things, namely: 1. That a crime has been committed. 2. That the accused person has been charged in the foreign State with the commission of such crime. 3. That he has fled from justice and is found within this State."

The prisoner in this case had been arrested on a warrant issued by a police magistrate; and, the complaint failing to show the three things specified, Judge Sandford discharged him on the ground that the case did not come within the provisions of the law of 1839.

So, also, in *The Matter of Leland*, 7 Abb. Pr. (N. S.) 64, coming before the same court in 1869, Judge McCunn said: "To enable a magistrate to arrest and examine an alleged fugitive from justice from another State, it must be shown by a complaint in writing on oath that a crime has been committed, that the accused has been charged in that other State with the commission of such crime, and that he has fled therefrom, and is found here. This affidavit is defective in all these particulars." In this case, as in the other, the arrest was made under the law of New York, and

not under that of Congress; and in both cases the complaint was not deemed sufficient, according to the provisions of that law, to warrant the proceedings, and hence the prisoners were discharged on *habeas corpus*.

The court, in both of these cases, treated the law of New York as not being inconsistent with the act of Congress, and hence as operative and valid for the purpose of a preliminary arrest and detention by a judicial magistrate. The discharge of the prisoners was founded on non-compliance with the provisions of this law.

**6. Laws of Pennsylvania.**—The legislature of Pennsylvania, on the 24th of May, 1878, passed a law in regard to the extradition of fugitive criminals, which, as published in Purdon's Annual Digest of the laws of Pennsylvania, for the years 1873–1878, p. 2108, provides as follows :

“Sec. 1. It shall be the duty of the Governor of this Commonwealth, in all cases where by virtue of a requisition made upon him by the Governor of another State or Territory, any citizen, inhabitant, or temporary resident of this Commonwealth, is to be arrested as a fugitive from justice (provided that the said requisition be accompanied with a certified copy of the indictment or information, from the authorities of such other State or Territory, charging such person with any crime in such State or Territory), to issue and transmit a warrant for such purpose to the Sheriff of the proper county, or other officer authorized by law to execute warrants, in which the requisition describes the party or parties to be residing or domiciled, and the Sheriff or deputy Sheriff, or other officer, as aforesaid, of the county, shall alone be competent to make service of the same.”

“Sec. 2. Before the Sheriff or his deputy, or other officer, as aforesaid, shall deliver the person arrested into the custody of the officer or officers named in the requisition, it shall be the duty of the Sheriff, or other officer, as aforesaid, to take the prisoner or prisoners before a Judge of a court of record, who shall in open court if in session, otherwise, at chambers, inform the prisoner or prisoners of the cause of his or their arrest, the nature of the process, and instruct him or them that if he or they claim not to be the particular person or persons mentioned in said requisition, indictment or affidavit, before a magistrate of said other State or Territory, charging said person with some crime, and warrant of arrest, he or they may have a writ of *habeas corpus*, upon filing

an affidavit to that effect: *Provided, however*, the investigation and hearing under said writ shall be limited to the question of identification, and shall not enter into the merits or the facts of the charge, or indictment, or information, accompanying or referred to in the requisition. And if, after due hearing, the prisoner or prisoners shall be found to be the parties indicted, or informed against, and mentioned in the requisition or warrant, then the court shall order and direct the Sheriff, or other officer as aforesaid, to deliver the prisoner or prisoners into the custody of the officer designated in the requisition as the agent upon the part of such State to receive him or them; otherwise, to be discharged from custody by the court."

"Sec. 3. It shall not be lawful for any person or officer to take any person or persons out of this Commonwealth, upon the ground that the prisoner or prisoners consent to go, or by reason of his or their willingness to waive the proceedings afore described, and any person or persons who shall arrest or procure the arrest of any citizen, inhabitant or temporary resident of this Commonwealth, for the purpose of taking or sending him to another State, without a requisition first had and obtained, accompanied by a certified copy of the indictment or information, and without a warrant issued by or under the direction of the Governor of this Commonwealth, served by the Sheriff or his deputy, and without first taking him before a Judge of a court of record, as aforesaid, shall be guilty of a misdemeanor, and upon conviction be sentenced to one year imprisonment."

"Sec. 4. Any violation of this act, on the part of the Sheriff or his deputy, or other officer, as aforesaid, shall be deemed a misdemeanor in office."

"Sec. 5. Nothing in this act shall be construed to prevent the Sheriff, or Chief of Police of any city, or other person, to cause the arrest of any person or persons, upon information of the offense or crime committed in another State, and that a warrant has there been issued for the arrest of the said party or parties, or has there been indicted: *Provided*, the officers of any town, city, or county, or authorities of such other State or Territory, shall procure a requisition, and have the same presented to the Governor of this Commonwealth, within fifteen days after the arrest shall have been made; and the prisoner or prisoners, upon being arrested or detained, shall be brought before a court or Judge, in the manner and for the purpose provided in the second section of this act: *Provided*, such person shall not be committed, or held to bail, for a longer period than fifteen days, exclusive of the day of arrest; at the expiration of which time, if the Sheriff has not received the requisition or warrant from the Governor of this Commonwealth, then the person or persons so arrested and detained shall be discharged from custody."

"Sec. 6. Any person giving false information under this act, with intent to injure any person, or deprive him of his liberty, shall be liable to the penalties of the third section of this act."

The first and second sections of this act relate to a case in which a party, by virtue of a requisition upon the Governor of Pennsylvania, "is to be arrested as a fugitive from justice." The Governor decides the question whether the party shall be arrested or not, upon such requisition, in view of the papers presented to him and referred to in the statute, and if he decides to order an arrest, then the law prescribes a procedure which must be observed, in the first instance by the Governor in issuing his warrant, in the second instance by the Sheriff or other officer who executes the warrant, and in the third instance by the Judge of a court of record before whom the party is to be brought, and who, if the party by affidavit denies that he is the person charged with crime, and applies for a writ of *habeas corpus*, is directed to grant the writ, and determine this question of identity, with no power to consider and determine any other question, and who is further directed, if deciding that the right party has been arrested, to order the Sheriff or other officer to make the delivery, and if deciding otherwise, then to order the discharge of the person.

This legislation does not interfere with the proper action of the law of Congress. It leaves the Governor to determine whether the party shall be arrested, upon the evidence provided for in that law, and then prescribes a procedure in respect to the arrest and delivery, in the absence of any regulation on this subject by Congress. The act is entitled "An Act to regulate proceedings under requisition upon the Governor of this Commonwealth for the apprehension of fugitives from justice." Congress having made no regulations as to the procedure in the apprehension and delivery of fugitive criminals, it is difficult to see why a State legislature may not adopt reasonable regulations on the subject, rather than leave the whole matter to the executive judgment. (*Ex parte Ammons*, 34 Ohio, 518; *Coffman v. Keightly*, 24 Ind. 509; and *Mohr's Case*, 2 Alabama Law Journal, 457.)

The fifth section of the act provides for a preliminary arrest and detention of an accused party, before any requisition or demand has been made, or the issue of a warrant by the Gover-



nor of Pennsylvania, and hence deals with the case before the act of Congress applies to it at all. There can be no objection to this section on any constitutional ground. The third, fourth and sixth sections have no relation whatever to any thing contained in the act of Congress.

The constitutionality of this law was, in *Ex parte Butler*, 13 Albany *Law Journal* 369, considered and affirmed, with a single exception, by the Court of Common Pleas of Luzerne county. Judge Handley said: "We must, therefore, hold that the act of 1878, relative to fugitives from justice, is constitutional, except only that portion of the second section which limits the rights of the accused to the mere question of identity when brought before a judge of a court of record on *habeas corpus*." The judge held that the court might go beyond this question, and examine and determine other questions relating to the lawfulness of the custody.

**7. The Laws of Ohio.**—The Legislature of Ohio, by the act of February 2, 1884, amended section 95 of the Revised Statutes of Ohio, so that the section should read as follows:

The Governor, in any case authorized by the Constitution of the United States, may, on demand, deliver over to the executive authority of any other State or Territory, any person charged therein with treason, felony, or other crime committed therein, and he may, on application, appoint an agent to demand of the executive authority of any other State or Territory any person charged with felony who has fled from justice in this State; but such demand or application must be accompanied by sworn evidence that the party charged is a fugitive from justice, and that the demand or application is made in good faith, for the punishment of crime, and not for the purpose of collecting a debt or pecuniary mulct, or of removing the alleged fugitive to a foreign jurisdiction with a view there to serve him with civil process; and also by a duly attested copy of an indictment or an information, or duly attested copy of a complaint made before a court or magistrate authorized to take the same, such complaint to be accompanied by an affidavit or affidavits to the facts constituting the offense charged, by persons having actual knowledge thereof; the same shall also be accompanied by a statement in writing from the prosecuting attorney of the proper county who shall briefly set forth all the facts of the case, the reputation of the party or parties asking such requisition, and whether, in his opinion, such requisition is sought from improper motives, or in

good faith to enforce the criminal laws of Ohio, and such further evidence in support thereof as the Governor may require. Fugitive convicts shall also be surrendered and demanded upon sworn evidence, duly authenticated, satisfactory to the Governor. For issuing such requisition, fees not to exceed five dollars may be charged."

The other sections of the Revised Statutes of Ohio, relating to fugitives from justice, provide as follows :

"Sec. 96. When such demand or application is made, the attorney-general, or the prosecuting attorney of any county, shall, if the Governor requires it, forthwith investigate the grounds thereof, and report to the Governor all the material facts which may come to his knowledge, with an abstract of the evidence in the case — and, especially in case of a person demanded, whether he is held in custody or is under recognizance to answer for any offense against the laws of this State, or by force of any civil process — with an opinion as to the legality and necessity of complying with the demand or application.

Sec. 97. If, in case of demand for the surrender of a person charged with an offense committed in another State or Territory, the Governor decides that it is proper to comply with the demand, he shall issue a warrant to the sheriff of the county in which such person so charged may be found, commanding him forthwith to arrest and bring such person before a judge of the supreme court or a judge of the court of common pleas of this State, to be examined on the charge; and upon the return of the warrant by the sheriff, with the person so charged in custody, the judge before whom the person so arrested is brought, and to whom the warrant is returned, shall proceed to hear and examine such charge, and, upon proof made in such examination by him adjudged sufficient, shall commit such person to the jail of the county in which such examination is so had, for a reasonable time to be fixed by the judge in the order of commitment, and thereupon shall cause notice to be given to the executive authority making such demand, or to the duly authorized agent of such executive authority appointed to receive the fugitive; and, on payment of all costs by such agent, such fugitive shall be delivered to him, to be thence removed to the proper place for prosecution; and if such agent does not appear within the time so fixed, and pay the costs as aforesaid, the sheriff shall discharge the person so imprisoned.

Sec. 7156. When an affidavit is filed before a judge of a court of common pleas, or judge of probate or police court, or a justice of the peace, setting forth that a person charged with the commission

of an offense against the laws of any other State, or of any of the Territories of the United States, and which, if the act had been committed in this State, would, by the laws thereof, have been a crime, is, at the time of filing such affidavit, within the county where the same is filed, such judge or justice of the peace shall issue his warrant, directed to the sheriff or any constable of the county, commanding him forthwith to arrest and bring before him the person so charged.

Sec. 7157. When a person is arrested in pursuance of the preceding section and brought before the officer who issued the warrant, the officer shall hear and examine such charge, and upon proof by him adjudged to be sufficient, commit such person to the jail of the county in which such examination is had, or cause him to be delivered to a suitable person to be removed before any such judge or justice of the proper county in which to take such examination, who shall take the same, and proceed as if the warrant had been issued by him.

Sec. 7158. When a person is committed to jail by a judge or justice of the peace under the preceding section, such judge or justice of the peace shall forthwith give notice, by letter or otherwise, to the sheriff of the county in which such offense was committed, or to the person injured by such offense; and no person so committed shall be detained longer in jail than is necessary to allow a reasonable time to the person so notified, after they receive such notice, to apply for and obtain the proper requisition for the person so committed."

These sections are supplemented by the following explanatory remarks prepared by the executive department, as a guide to practice :

1. With the exception of what is mentioned in the next paragraph, the papers required by the statutes of Ohio to be attached to a requisition are the same as are required by the statutes and regulations of other States and the statutes of the United States. There must be a copy of the indictment, information, or complaint, upon which the requisition is based, duly authenticated — that is to say, a copy of an indictment or information, certified to be such by the clerk of the court in which the original is filed, or a copy of a complaint, certified to be such by the magistrate in whose office the original is filed, and the official character of the magistrate certified by the clerk of court or other proper officer.

2. The exception referred to in the preceding paragraph is that, *in a case of complaint*, the copy of the instrument must be accompanied by "an affidavit, or affidavits, to the facts constituting the offense charged, by persons having actual knowledge thereof."

The General Assembly intended by this requirement to provide against imposition in cases which have not been investigated by a grand jury, and to secure, under oath, such evidence as would justify an indictment, and as shall leave no reasonable doubt as to the guilt of the accused and the character of the offense. The affidavit or affidavits should set forth all known facts and circumstances having a bearing upon the case.

3. The word "information," in section 95, refers only to informations filed in the office of the clerk of the court, upon which crimes are prosecuted in lieu of indictments. In some States, affidavits which, in Ohio, are known as *complaints*, are termed *informations*. These are treated as complaints, and copies thereof must be accompanied by "an affidavit or affidavits to the facts constituting the offense charged," etc., as stated above.

4. In all cases an affidavit substantially as follows is required : That the person for whom the requisition is made is a fugitive from justice, and that the requisition for his extradition is made in good faith, with the sole intent to prosecute him for the offense charged, and not to secure his presence in the demanding State with the view there to serve him with civil process, nor for any other private purpose. This seems to be required by all the States.

5. Judges before whom alleged fugitives are taken for examination require either duplicates or copies of all papers attached to a requisition. It is a saving of both time and expense when agents are supplied with duplicates before leaving home, as the necessity of making copies is avoided.

6. Sections 7156, 7157, and 7158 provide for the arrest of fugitives in the absence of an extradition warrant, and their commitment for a *reasonable time* to apply for and obtain a requisition. When there is danger of the escape of a fugitive before he can be served with an extradition warrant, it is suggested that the agent request the Ohio officer with whom he is in communication to proceed under said sections.

As to the character and validity of this legislation, the following observations are submitted :

(1.) The provisions, contained in sections 7156, 7157, and 7158, relate to a preliminary arrest and detention of fugitive criminals by the warrant of judicial magistrates, and, like similar provisions in the laws of Massachusetts, New York, and other States, operate upon the case before the Constitution or the law of Congress has any application to it. There can be no constitutional objection to these provisions.

(2.) Section 95 confers authority upon the Governor of Ohio in the case stated, and subject to the conditions specified. This authority is to be exercised "in any case authorized by the Constitution of the United States." The reference here is to the extradition provision of that Constitution. No reference is made to the law of Congress enacted for the execution of that provision, and considered as defining the "case" had in view.

The authority given by the section is twofold in its form of action. The first form is that of delivering, on demand, to the executive authority of any other State or Territory, any person charged therein with treason, felony, or other crime committed therein; and the second is that of appointing an agent to demand of the executive authority of any other State or Territory any person charged with felony who has fled from the justice of Ohio. In the first form the whole ground, as to crime, covered by the Constitution, is specified; and, in the second form, the Governor's authority as given, is limited to felony. This limitation to felony is not required by the Constitution or by the law of Congress; and yet there is no reason to doubt that the legislature of Ohio had the right to confine the action of the Governor of that State to cases of felony, when demanding the surrender of fugitive criminals from other States or Territories. Neither the Constitution nor the law of Congress imposes the demand at all upon the Governor of any State or Territory. Both leave the question to his discretion, and this discretion the legislature may regulate.

The power given to the Governor of Ohio in this section, and in the case stated therein, is qualified by the following conditions:

(a.) The demand for the delivery of a fugitive criminal addressed to the Governor by the Governor of some other State or Territory, or the application to the Governor to appoint an agent to make such demand upon the executive authority of some other State or Territory, must "be accompanied by sworn evidence that the party charged is a fugitive from justice." This provision is in the exact words used in the law of Massachusetts, and seems to have been borrowed from that law.

The law of Congress, while specifying the manner of making and authenticating the charge of crime, contains no express provision as to this specific question, and in regard to this omission, the Supreme Court of Alabama, in *Mohr's Case*, 2 Alabama

*Law Journal*, 457 said: "The better view seems to us to be that one of the purposes of pretermittting express Congressional legislation on this point was to refer the matter to executive determination, subject to review by *habeas corpus* in the courts in all proper cases."

The question whether the accused party is actually a fugitive from justice is jurisdictional, and the fact must be shown by legal evidence, or no case for extradition under the Constitution and the law of Congress will exist. The law of Ohio declares that this must be shown by "sworn evidence," without further specifying the evidence, and it is difficult, in the absence of any express provision by Congress on the subject, to see any objection to such a law. It simply makes a rule for the Governor, whether in demanding or surrendering fugitive criminals, where Congress has made no rule, and where he would otherwise be under the necessity of making a rule for himself.

(b.) The demand or application must be accompanied by sworn evidence that the one or the other, as the case may be, "is made in good faith, for the punishment of crime, and not for the purpose of collecting a debt or pecuniary mulct, or of removing the alleged fugitive to a foreign jurisdiction with a view there to serve him with a civil process." There is no difficulty with this provision when the Governor of Ohio is asked to make a requisition upon the Governor of another State or Territory for the delivery of a fugitive criminal, since in such a case, neither the Constitution nor the law of Congress imposes any duty upon him, or furnishes any rule by which he shall decide the point. He may make a rule for himself in the absence of one made by the legislature of the State.

How then does the case stand when, under the Constitution and the law of Congress, a demand is addressed to the Governor of Ohio by the Governor of some other State or Territory? Must that demand be accompanied by sworn evidence in regard to the "good faith" of the proceedings? Must the Governor making the demand thus prove that he is not seeking to perpetrate a fraud? Would the absence of such evidence, in a given case, invalidate the whole proceedings, and entitle the party, if arrested, to a discharge on *habeas corpus*?

We are not aware of any reported case in which this specific point was considered and determined by a court. The Supreme Court of Ohio, in *Compton v. Wilder*, 29 Albany *Law Journal*, 232, incidentally alluded to that part of section 95 of the Revised Statutes of that State, now under consideration, as "a law controlling the action of the Governor," but did not pass upon the question, since this point was not before the court.

It is clear, however, that no such evidence as to "good faith," etc., is required by the Constitution or the law of Congress, in order to make the case in which the law imposes the obligation of delivery upon the executive authority of the State or Territory to which the accused party has fled. The law assumes that the demanding Governor will act in "good faith," but does not require "sworn evidence" to prove this fact.

It is equally clear that when the proceedings in an extradition case are, under the Constitution and the law of Congress, sufficient to establish the obligation of delivery, they cannot be made insufficient by the local law of a State. If they are sufficient in one State, they must be equally so in every State. They rest upon the supreme law of the land, and no State can constitutionally so legislate as to defeat their operation, or interfere with that operation. It is exceedingly difficult, if not impossible, to harmonize this provision about "good faith" with the law of Congress. It is certainly in excess of that law, and annexes a new condition to the obligation of delivery.

(c.) The demand or complaint must be accompanied "by a duly attested copy of an indictment or an information, or duly attested copy of a complaint made before a court or magistrate authorized to take the same." This, in its essential substance, is similar to the provision found in the law of Congress. The language is different in the two cases, but the meaning is the same in both. The "complaint" mentioned in the one is the "affidavit" mentioned in the other, by which the complaint is made. An "information" is not spoken of in the law of Congress, yet in certain cases it is the legal equivalent of an indictment, and serves the same purpose. The law of Ohio requires a duly authenticated copy of the indictment or information, or of the complaint, that makes the charge of crime, and the law of Congress requires the

same, with the provision that the authentication shall be by the certificate of the demanding Governor. There is here no conflict between the two laws as to the mode of charging the crime.

(d.) If the charge of crime is made by a complaint, then this complaint must be "accompanied by an affidavit or affidavits to the facts constituting the offense charged, by persons having actual knowledge thereof." This provision, like the similar one in the law of Massachusetts, is in addition to the "affidavit made before a magistrate" required by the law of Congress. The law of Congress makes the certified copy of the affidavit, setting forth the facts which constitute the offense, and in this way charging the crime, sufficient to establish the obligation of delivery. The law of Ohio, however, adds to this affidavit or complaint another affidavit or affidavits setting forth the same facts, and makes this necessary, not only when the Governor of that State demands the delivery of a fugitive criminal, but also when he is requested by the Governor of another State or Territory to deliver up such a criminal.

There is, of course, no constitutional objection to this provision when the Governor of Ohio demands the delivery of a fugitive criminal from another State, since then the rights of that State are not involved in the requirement. But when the demand is addressed by the Governor of another State to the Governor of Ohio, then, according to this provision, the "affidavit made before a magistrate" provided for by the law of Congress, will not be sufficient, unless it be supplemented by the "affidavit or affidavits" provided for by the law of Ohio. This is an attempt by the local law of a State to add, in respect to the action of that State, to the conditions of the obligation of delivery established by the supreme law of the land, which law is alike applicable and authoritative in all the States. It is an attempt to change this law as the rule by which the Governor of Ohio is to be controlled in delivering up fugitive criminals, and hence as the rule by which the Governors of other States are to be controlled in asking for a delivery from the Governor of Ohio. It will not be sufficient for them to comply with the law of Congress, unless they also comply with this particular in the law of Ohio. This we regard as a grave objection to the provision.

(e.) "The same shall also be accompanied by a statement in



writing from the prosecuting attorney of the proper county, who shall briefly set forth all the facts of the case, the reputation of the party or parties asking such requisition, and whether, in his opinion, such requisition is sought from improper motives, or in good faith to enforce the criminal laws of Ohio, and such further evidence in support thereof as the Governor may require."

The connection, in which the words "the same" occur, shows that they refer to a case in which the charge of crime is made by a "complaint;" and the contents of this provision also show that the provision itself refers to a case in which the Governor of Ohio is asked to issue his requisition for the delivery of a person who, being charged with felony, has fled from the justice of that State, and whose extradition is professedly sought to enforce against him "the criminal laws of Ohio." Assuming this to be the correct construction of the language, then there can be no doubt as to the power of the legislature thus to provide, since the provision touches no point established by the Constitution or the law of Congress. It simply regulates the action of the Governor of Ohio in making a demand for the delivery of a fugitive criminal, and not in complying with one.

The provision in the law of Massachusetts relating to "such further evidence in support thereof as the Governor may require," also applies only to a case in which a "complaint" is made; but, unlike the provision in the law of Ohio, it applies to such a case, whether the Governor of Massachusetts demands the delivery of a fugitive criminal, or is requested to deliver up such a criminal. The legislation, when applied in the latter of these cases, is simply astonishing. It authorizes the Governor of Massachusetts, in the case of a complaint in which he is asked to deliver up a fugitive criminal, not only to act upon the evidence prescribed by the law of Congress and by the law of that State, but also to require "such further evidence in support" of the complaint as he may think necessary or expedient.

This makes a rule for him as to "evidence," and then allows him to make any rule that he pleases to make for himself beyond that rule as to "further evidence," when considering the question whether he will or will not deliver up a fugitive criminal. It is not possible to harmonize the provision with the law of Congress. That law, as to the charge of crime, prescribes the evidence which

the Governor of every State and Territory, when asked to deliver up a fugitive criminal, is bound to regard as sufficient, and no Governor and no State can have any authority for demanding more evidence than is there prescribed.

(f.) "Fugitive convicts shall also be so surrendered and demanded upon sworn evidence, duly authenticated, satisfactory to the Governor." The law of Congress does not in express terms apply to a convict, and it does not in such terms exclude its application to a convict. One convicted of crime, and escaping from custody, does not cease to be "charged" with crime, by the fact of his conviction, and the evidence upon which he might be arrested and delivered up before conviction, ought to be sufficient after conviction. The law of Ohio leaves the question with the discretion of the Governor acting "upon sworn evidence, duly authenticated."

(g.) "For issuing such requisition fees not to exceed five dollars may be charged." This is a matter of domestic regulation within the exclusive province of the legislation of that State.

(3.) Section 96 of the Revised Statutes of Ohio is borrowed, almost in exact words, from section 2 of chapter 177 of the General Statutes of Massachusetts, and simply makes it the duty of the Attorney-General of the State, or the prosecuting officer of any county at the Governor's request, to aid him in the examination of a case, whether it be a demand addressed to him or an application to him for a requisition to be addressed to the Governor of some other State or Territory. Such a law raises no question as to its constitutional validity.

(4.) Section 97 of these statutes relates entirely to the procedure to be adopted in delivering up a fugitive criminal when the Governor of Ohio has decided "that it is proper to comply with the demand" for such delivery. The Governor is directed to issue his warrant to the Sheriff of the proper county, and the Sheriff having arrested the party, is directed to bring him before the Judge designated in the section. The Judge is then to hear and examine the charge against this party, and if deciding the proof to be sufficient, he is to commit the party to prison for a reasonable time, to be fixed in the order of commitment, and to give the notice specified. The party is then to be delivered up to the agent of the demanding State or Territory, if he appears

within the time so specified and pays all costs, and if he does not appear within this time and pay the costs, the Sheriff is to discharge the party.

This differs very materially from the provision made in the second section of the act of May 24, 1878, enacted by the legislature of Pennsylvania, which directs the Sheriff to bring the party arrested before a Judge of a court of record, and gives him the right to sue out a writ of *habeas corpus* on the question of identity, and limits the jurisdiction of the Judge to the determination of that question. The Ohio law authorizes the Judge, before whom the party is brought, to hear and examine the whole case, after the Governor has decided it to be a proper one for a compliance with the demand, and provides for the actual delivery of the party only in the event that the Judge shall deem the proof sufficient. The proceeding before the Judge is not that of *habeas corpus*, but direct in its character, and the question whether the party shall be delivered up or not depends, under this law, upon the decision of the Judge who hears the case after the Governor has decided it to be a proper one for delivery. The Judge, in effect, reviews the Governor's decision.

The grave difficulty with this proceeding before the Judge, as provided for in the statute, is that it is not consistent with the law of Congress. Chief Justice Booth, in *The State v. Schlemm*, 4 Harring. 577, said: "The right and the power under the Constitution of the United States, and the first section of the act of Congress of 1793, to demand, arrest, commit and surrender fugitives from justice, are exclusively vested in, and confided to, the executive authority of the State from which the fugitive has escaped, and that of the State where he has taken refuge."

This is plain on the very face of the law, and if so, then the decision of the Governor to deliver up a fugitive criminal, and his warrant issued in pursuance thereof, are final as to the merits of the case, unless, in a proceeding on *habeas corpus*, they shall be nullified and made of no effect on the ground of some illegality. The law of Ohio, however, places the decision of a Judge on the merits of a case, between the decision of the Governor and the delivery of the fugitive, and provides for the delivery only in the event that the Judge shall, after hearing and examining the charge, hold the evidence to be sufficient. This part of

the section is clearly not consistent with either the letter or the intent of the law of Congress. It gives a jurisdiction to a Judge where that law has given an exclusive jurisdiction to the Governor.

The law of Congress fixes the period of six months as the time in which the prisoner after his arrest may be detained for delivery, and provides that if the agent of the demanding State or Territory does not appear within this time to receive him into custody, the prisoner may be discharged. The law of Ohio, however, authorizes the Judge before whom the prisoner is brought to fix the time in his discretion, simply saying that the detention shall be "for a reasonable time," which is plainly not consistent with the law of Congress.

The result, reached by this examination of the extradition laws of Ohio, is that these laws contain some provisions that are legitimate and unobjectionable, and also other provisions that are open to serious objections on constitutional grounds. It is assumed, in coming to this conclusion, that the law of Congress is constitutional, since the Supreme Court of the United States has so declared, and hence that no State law inconsistent with it, or calculated to impair its operation, can be constitutional. In such a case the Governor of a State is bound by the former rather than by the latter law.

(5.) There is a question which, before dismissing this comment on the extradition laws of Ohio, deserves to be considered. That question is this: If the preliminary proceedings in the State of Ohio, required by these laws, but not required by the extradition provision of the Constitution or by the law of Congress, and, consequently, in excess of the requirements of the latter, have not all been taken in a case in which the Governor of that State has been asked to demand and has demanded and obtained, from the Governor of another State, the arrest and delivery of a fugitive criminal, would this omission in the proceedings to comply with all the extradition regulations in the law of Ohio render the whole procedure unlawful, and entitle the criminal, after being brought into the State of Ohio, to a discharge from custody on *habeas corpus*?

There is no reported case, so far as we are aware, that answers this precise question. Looking at the matter, however, in the light of the Constitution and laws of the United States and the

laws of Ohio, the proper answer would seem to be that, if the preliminary proceedings taken in Ohio fulfilled the requirements of the Constitution and laws of the United States, including therein a legal showing that the party demanded and delivered up was actually a fugitive from the justice of Ohio, the custody thus acquired would be lawful, and any court in Ohio, having jurisdiction of the crime charged, would have the legal right to hold and try the party for the same.

If it be true, as it would be according to the supposition stated, that the procedure by which the party was brought into Ohio was, in some respects, in violation, by omission, of the laws of that State, it would be just as true, according to the answer above given, that this procedure was in conformity with the Constitution and laws of the United States; and this would be sufficient to sustain the lawfulness of the extradition and resulting custody, whether all the conditions of getting the party into Ohio, prescribed by the laws of that State, had been complied with or not. The party would be brought back to Ohio under the provisions and with the sanction of "the supreme law of the land;" and this fact would not be set aside, or rendered ineffectual, by the non-observance of local regulations in that State which are no part of this "supreme law."

Moreover, the regulations, in the laws of Ohio, with respect to the matter of "good faith," the supplementary "affidavit or affidavits" in a case of complaint, and the "reputation" and "motives" of the party or parties seeking extradition by complaint, which are to be observed by the Governor of Ohio when demanding fugitive criminals from the Governors of other States, and which are not found in the Constitution and laws of the United States, are not to be taken as *jurisdictional* regulations in the sense that, if they are not complied with in the actual process of extradition, this one fact will render the whole proceeding null and void, and oust the jurisdiction of the courts of Ohio to hold and try the extradited party for the crime charged against him, even though his extradition was in conformity with the Constitution and laws of the United States. These regulations, being made by the legislature of Ohio, and not being unconstitutional when the extradition of fugitive criminals is to that State, are to be observed by Ohio Governors when demanding such criminals

from the Governors of other States ; but their non-observance will not invalidate an extradition that is valid according to "the supreme law of the land."

The case is different in respect to the regulation which relates to the question whether the party is a fugitive from justice or not, since the Constitution and the law of Congress make this a jurisdictional question, while neither specifies the manner in which the fact shall be shown. If the fact is not shown by legal evidence, then a State Governor has no jurisdiction either to demand or deliver up an accused party ; and if a party, in the absence of such showing, has been arrested and is in custody, he is entitled to a discharge on *habeas corpus*, whether he is in the State from which he was demanded, or has been removed to the State demanding him. A State law, requiring the legal showing of this fact, simply requires the showing of a jurisdictional fact. No process of extradition, under the Constitution and laws of the United States, can be valid without such a showing.

In a word, while the legislature of Ohio, or of any other State, may, in its discretion, regulate the action of the Governor thereof in demanding the delivery of fugitive criminals, and while the Governor, in making such demands, should follow regulations thus made, rather than take his own judgment as the exclusive guide, their non-observance in a given case will not make the extradition unlawful, and entitle the party to a discharge on *habeas corpus*, provided that the extradition is lawful according to the Constitution and laws of the United States. The latter lawfulness is the supreme lawfulness, and settles the rightfulness of the custody.

**8. The Laws of Delaware.**— The Act of the legislature of Delaware, March 9, 1883, chapter 223, is, with slight variations, a reproduction of the extradition laws of Ohio ; and the preceding observations in regard to the latter apply with equal force to the former.

**9. The Laws of California.**— The Codes and Statutes of California, 1876, vol. 2, pp. 1385, 1386, contain a series of provisions relating to fugitive criminals, one of which imposes the duty of their delivery upon the Governor of the State, in the circumstances

specified by the Constitution and laws of the United States. Other provisions relate to the arrest and detention of such criminals by civil magistrates, before they have been demanded, in order that they may be delivered up, if demanded, in accordance with the Constitution and the law of Congress.

The Supreme Court of California, in *Ex parte Cubreth*, 49 Cal. 436, held that the law, "authorizing the arrest of a fugitive from justice who has fled from another State, before a demand for his surrender by the executive authority of the State from which he fled, and his detention for a reasonable time to afford an opportunity for such executive demand, is not in conflict with the second section of article four of the Constitution of the United States." The Chief Justice, in stating the opinion of the court, said :

"That while the provision of the Constitution referred to, required that the fugitive should be surrendered upon the demand of the executive of the State in which the crime is charged to have been committed, it did not otherwise, or in the absence of the executive demand, undertake to define the duties or limit the authority of the State within which the fugitive from justice might be found. The Constitution of the United States does not assume to deal with the question, before the proper executive demand shall have been made, while, upon the other hand, the statute provides for the detention of the fugitive for a reasonable length of time in advance of, and to afford an opportunity for, the executive demand upon which the surrender is to be made. \* \* \* The paramount constitutional duty of the State to make the surrender upon proper executive demand was in nowise in conflict with its reserved power to deal with the fugitive in the absence of such demand."

The same doctrine was adopted by the court in *Ex parte Rosenblatt*, 51 Cal. 285.

**10. The Laws of Indiana.** — The laws of Indiana provide, among other things, that the fugitive when demanded, and arrested under the warrant of the Governor of that State, shall, before being delivered up, be brought before a judicial magistrate, and that such magistrate shall inquire into and determine the question of identity, ordering the surrender of the prisoner if he be found to be the person demanded, and ordering his discharge if he be not so found.

The Supreme Court of Indiana held, in *Robinson v. Flanders*, 29 Ind. 10, that, inasmuch as Congress had not prescribed the precise steps to be taken in securing the arrest and delivery of the party demanded, it was competent for the legislature of the State to adopt such reasonable laws on the subject as would be calculated to give effect to the obligation imposed by the Constitution, and that, to this end, a State law requiring the officer making the arrest to take the party before a judge for the purpose of identification, and also the judge to determine this question, is to be deemed valid.

The same provision is made by law in the General Statutes of Kentucky.

These examples of State laws, as well as the judicial authorities above cited, are sufficient to settle the question that such legislation, with reference to fugitive criminals, not inconsistent with the Constitution and the law of Congress to carry its extradition provision into effect, is both permissible and proper. The States of the Union have assumed the truth of this general proposition, and acted accordingly. State legislatures and State courts have not understood the language used by the Supreme Court of the United States, in *Prigg v. The Commonwealth of Pennsylvania*, 16 Pet. 539, as excluding all State legislation on the subject.

The reader, by consulting the Appendix to this treatise, will there find the whole body of State extradition laws. Some of these laws, as has been shown in examining the laws of Ohio, are not consistent with the Constitution and laws of the United States, and when this is the fact, they are of no force. There are, however, other State laws to which this objection does not apply; and in all such cases the laws are of binding authority, and are to be executed in proceedings for extradition.

The Supreme Court of the United States has in no instance rendered a positive decision, in which it held that no State legislation on the subject of inter-State extradition is allowable. The fact that Congress has legislated on the subject, and that this legislation is constitutional, makes it necessary for the States to legislate consistently with the law of Congress; but this does not exclude them entirely from this field of legislative action.

## 11. Power of State Magistrates. — How then would the



case stand if no such State laws were enacted, as once was the fact in all of the States? Would the civil magistracy, having the general power of issuing warrants of arrest for alleged offenses, and, on proper evidence, committing the accused party to prison, or requiring him to give bail, be authorized in the absence of special legislation giving the authority, to exercise this power for the arrest of fugitive criminals from other States or Territories, before any demand for their delivery, and to detain them for a reasonable time, in order that a requisition in due form might be made upon the executive of the State or Territory to which they have fled?

The State courts of this country have had occasion to consider this question; and the following cases show how it has been answered:

In *The People v. S. & J. Wright*, 2 Caines, 212, which came before the Supreme Court of New York in 1804, it appeared that the prisoners were in the custody of the sheriff on a heavy civil process, and that, while thus held, a warrant was issued against them by a police magistrate of the city of New York, on the basis of an indictment found in Massachusetts and charging them with fraud in that State. The District Attorney moved to take them from the custody of the sheriff and commit them to Bridewell. The court replied: "We cannot do it. We have no jurisdiction over offenses committed in other States. The Constitution points out a mode by which offenders, flying from one State into another, may be claimed. They must be demanded by the executive authority of the State from which they fled."

This decision assumes that the civil magistracy have no power to arrest and detain such fugitive criminals, in advance of, or as preliminary to, a demand for their delivery by the proper executive authority.

In *The People v. Schenck*, 2 Johns. 479 — a case which came before the Supreme Court of New York in 1807 — the record showed that the prisoner had been indicted in the Court of General Sessions in the city of New York for stealing a gun, and that the jury found a special verdict to the effect that he stole the gun in New Jersey, and then brought it to New York city and there offered it for sale. The case being removed to the Supreme

Court by *certiorari*, the court ordered the prisoner to be discharged on the indictment, and then said: "But we think it proper to order that he be detained in prison for three weeks; and in the meantime let notice be given to the executive of the State of New Jersey that the prisoner is detained on a charge of felony committed in that State; and if no application be made for the delivery of the prisoner within that time, he must be discharged." The court here assumed jurisdiction for the purpose of the temporary detention of the prisoner for an offense committed in New Jersey; and this reversed the doctrine stated in the previous case.

In *The State v. Howell*, R. M. Charlton, 120, Judge Charlton, in answer to the objection that the prisoner could not be arrested and held in Georgia for an offense alleged to have been committed in South Carolina, except upon the requisition of the Governor of the latter State, demanding him as a fugitive from justice, said: "I am of the opinion that a person charged with felony in another State, and fleeing to this, may, upon a principle of comity which obtains in such cases between sovereign States, be detained for a reasonable period, for the purpose of affording time for an application to the Governor of the State where the offense is charged to have been committed, to make the demand as stated in the Constitution."

This case occurred in 1820; and in 1842 Judge Henry, of the same court, in *The State v. Loper*, Ga. Decis., Part II, 33, held that "a fugitive from justice from another State may be arrested here, and, on sufficient evidence of guilt, be detained in custody for a reasonable time, in order to give the foreign executive an opportunity to make a regular demand for his delivery under the Constitution of the United States." The Judge rested this opinion on "the law of nations and the common law of this land," citing a series of authorities in its support.

In *The Matter of Fetter*, 3 Labr. 311, the Chief Justice of the Supreme Court of New Jersey said in 1852: "I am of opinion, both upon principle and authority, that a fugitive from justice from either of the United States may, under the provisions of the Constitution, be arrested and detained in this State preparatory to his surrender, before a requisition is actually made by the executive of the State where the crime was committed. It is an

exercise of power essential to the full operation of the Constitution, and has been sanctioned by a long and uniform course of practice." New Jersey had not then passed any law to this effect.

In reference to *The People v. S. & J. Wright, supra*, in which a different doctrine was held, the Chief Justice said: "That case does not appear to have undergone mature deliberation, and must be regarded as overruled by the late authorities."

The Chief Justice remarked in this case that the "right of arrest and imprisonment by the civil magistrates of offenders against the laws of another Government" had been recognized "from a very early period." (*Rex v. Hutchinson*, 29 Car. II, 3 Keble, 785; *The Case of Col. Lundy*, 2 Vent. 314; *Rex v. Kimberly*, 2 Stran. 848; *Mure v. Kaye*, 4 Taunt. 34; 1 Chit. Cr. Law, 14, 46.)

In *The State v. Buzine*, 4 Harring. 572, Chief Justice Booth said, in 1845: "My opinion, therefore, is that any Judge or Justice of the peace in this State, or the Mayor of the city of Wilmington, upon probable cause supported by oath or affirmation, has the power to issue a warrant to arrest and bring before him a party suspected of having committed a crime in another State, before a demand has been made by the executive of such State, and that, after examination, upon such proof or probability of the party having committed the offense as would be sufficient to put him upon trial, it is the duty of the magistrate to commit him to prison for such reasonable time as will allow notice to be given to the executive authority of the State where the offense was committed, and a demand to be made, pursuant to the act of Congress, for the delivery of the fugitive."

The ground on which this opinion rests was thus stated: "To enable the executive to perform this duty it is necessary that magistrates should have the power to arrest and commit the fugitive *before* as well as after a demand has been made. The exercise of the power is essential to carry into effect the provision of the Constitution; otherwise an immunity may be offered to the most atrocious criminals. If a felon, notoriously guilty of murder, can by escaping into another State set the law at defiance until a demand is regularly made on the executive, and a warrant is issued for his arrest, the object of the Constitution may be defeated and the act of Congress rendered nugatory."

In *The Commonwealth v. Deacon*, 10 Serg. and Rawle, 135, Chief Justice Tighlman said: "When the executive has been in the habit of delivering up fugitives, or is obliged by treaty so to do, the magistrates may issue warrants of arrest of their own accord, on the proper evidence, in order the more effectually to accomplish the intent of the Government by preventing the escape of the criminal. On this principle we arrest offenders who have fled from one of the United States to another, even before demand has been made by the executive of the State from which the fugitive had fled."

In *The Matter of Romaine*, 23 Cal. 585, the following doctrine was laid down by the court: "Section 2 of article 4 of the Constitution of the United States is a solemn compact between the States, to be enforced by State legislation or by judicial action; and being a part of the supreme law of the land, it is a part of the law of each State; and State officers, whose duty it is to adjudicate or execute the laws, are governed by it; and State courts of general original jurisdiction, exercising the usual powers of common-law courts, are fully competent to hear and determine all matters and to issue all necessary writs for the arrest and transfer of fugitive criminals to the authorized agent of the State from which they fled, without any special legislation."

In *The Matter of Thomas F. Goodhue*, 1 Wheeler's Crim. Cas. 427, it appeared that the prisoner was held on three commitments, two of which were upon the charge of having been guilty of false pretenses in the State of Kentucky, by which he obtained certain sums of money with a fraudulent intention. Recorder Riker said in regard to the case:

"It appears upon the oath of a witness, which oath is taken on competent authority, that the prisoner has committed a public offense against the laws of the State of Kentucky, and that he is a fugitive from the justice of that State. The Constitution of the United States provides expressly for his arrest. The Constitution is sacred, and we are bound by it. It is the supreme law of the land. It may be said that though it be true that on the demand of the executive power of Kentucky the prisoner may doubtless be given up, yet until he is demanded, he is to be held at large. This cannot be the meaning of the Constitution. We may hold a fugitive, to give a reasonable time to demand him.

The decision of the court, therefore, is that Thomas F. Goodhue be remanded and detained in custody six weeks, to give time to the executive of Kentucky to demand him under and in pursuance of the Constitution of the United States."

Chancellor Kent subsequently discharged the prisoner, on the ground that a sufficient time had elapsed for the executive of the State of Kentucky to demand him if he designed to do so, and that no demand had been made. (*In the Matter of Goodhue*, 2 Johns. Ch. 198.)

Mr. Lewis, in his United States Criminal Law, p. 260, says: "In Pennsylvania it is not necessary, in order to arrest a fugitive that a requisition should be produced from the Governor at the time of the arrest. If the oath, on which the warrant issues, is sufficient to raise a good reason for believing that the party charged has committed a crime in the sister State, it is the duty of the magistrate to commit the accused till time be given to take the legal steps for demanding a surrender." (*The Commonwealth v. Hassit*, Vaux's Cases, 32.)

These authorities, with the exception of the one first quoted, and which may be considered as overruled, proceed on the assumption that the civil magistracy of the respective States, authorized to arrest and commit offenders against the laws thereof, may, in the absence of special statutory provisions, extend their jurisdiction to the arrest and detention of fugitive criminals from other States, as preliminary to a requisition for their delivery under the Constitution and laws of the United States. Different reasons are assigned for the exercise of this judicial power; yet the authorities, with a single exception, agree that the power exists, even when not specially conferred by statute.

The evidence justifying such arrests and detentions must, as remarked by Chief Justice Booth, be sufficient to put the accused on trial before a court having jurisdiction for this purpose; and, of course, the magistrate in each case must be the judge of this evidence, subject to the right of the accused, if committed to prison, to have his case re-examined on a writ of *habeas corpus* or *certiorari*, or of both.

Where, as is now the fact in many of the States, and certainly should be in all of them, these preliminary proceedings are authorized and regulated by special statutes, there, of course, the judicial

action will find both its reasons and its rules in legislative enactment, and must conform thereto. The Supreme Court of California held in *the Matter of Romaine, supra*, that State courts, having the usual powers of common-law courts, might go so far as to issue writs for the delivery of fugitive criminals, "without any special legislation;" yet, this proposition, if admitted, would not be true where legislation has defined the functions of such courts, and explicitly assigned the act of delivery to the executive authority.

The Supreme Court of the United States, in *Kentucky v. Dennison*, 24 How. 66, held that Congress could not, by a legislative act, provide any method for coercing the Governor of a State to make the delivery of a fugitive criminal, even when all the requisite conditions have been supplied. He may decline to perform the duty; and if he does, there is no power in the General Government to compel the performance.

There is no doubt, however, that the legislatures of the several States may impose this duty by law. Some of them have done so; and so long as Congress provides no other method for the extradition of fugitive criminals, every State should make the duty compulsory upon its executive authority. This is required by good faith in respect to the end specified by the Constitution, and sought to be attained by the law of Congress.

## CHAPTER IV.

## EXTRADITABLE CRIMES.

**1. The Provision of the Constitution.**—The provision of the Constitution, for extradition between the States of the Union, is confined wholly to crimes. The specification made is that of "treason, felony, or other crime." Precisely the same specification is adopted in the act of 1793, for carrying this provision into effect.

Two of the crimes — namely "treason" and "felony"—are designated by their common law titles.

"Treason," considered as an offense against the United States, is, by the Constitution, defined to consist "in levying war against them, or in adhering to their enemies, giving them aid and comfort." Treason may be committed against a State, as well as against the United States; and the definition in the former case is substantially what it is in the latter. Some of the States have defined the offense by a specific statute.

The Penal Code of New York, p. 9, enacted in 1881, declares that "treason against the people of the State consists in levying war against the people of the State within this State, or a combination of two or more persons by force to usurp the government of the State, or to overturn the same, shown by a forcible attempt, made within the State, to accomplish that purpose; or adhering to the enemies of the State, while separately engaged in war with a foreign country, in a case prescribed in the Constitution of the United States, or giving to such enemies aid and comfort within the State or elsewhere."

The General Statutes of Massachusetts, p. 790, thus define the crime of treason: "Treason against this Commonwealth shall consist only in levying war against the same, or in adhering to the enemies thereof, giving them aid and comfort."

Each State has an unquestionable right to define treason against itself by statute, and where it has done so the term, as used in the extradition provision of the Constitution, is to be construed according to the definition given in the statute, since it is here

used in the sense of treason against the State. Where no such definition is given the common law import of the term is the one to be adopted.

"Felony," though not accurately defined by the common law of this country, includes all offenses of the higher grade, generally those punishable by death or by imprisonment in the State prison. "Felony," says Mr. Bishop, "is any offense which by the statutes or by the common law is punishable with death, or to which the old English law attached the total forfeiture of lands or goods or both, or which a statute expressly declares to be such." (Bishop's Crim. Law, 6th ed., vol. 1, p. 343.)

Many of the States have by statute defined the term to mean all offenses punishable either by death or by imprisonment in the State prison. The Penal Code of New York, p. 2, declares that "a felony is a crime which is or may be punishable by either death, or imprisonment in a State prison;" and as in the case of treason, so here, where a statute fixes the meaning of the term, that it is to be taken as the meaning of the same term as used in the Constitutional clause under consideration.

"Treason" and "felony" — the two crimes specifically named in the Constitution and the law — are, however, not the only crimes for which extradition may be demanded. The Constitution, after specifying these crimes, adds the important and comprehensive phrase "or other crime." This phrase was by the Federal Convention substituted for the words "high misdemeanor," used in the Articles of Confederation, "in order to comprehend all proper cases," and because it was "doubtful whether high misdemeanor had not a technical meaning too limited." (2 Mad. Papers, p. 1447.)

The natural and obvious meaning of the phrase is the one that makes it inclusive of *all* crimes not embraced in the two categories of "treason" and "felony." These two offenses are mentioned by their specific titles; and then the Constitution adds the words "or other crime." The word "crime" is the most general term in the English language to designate offenses against law. It includes treason, felony, and all grades of misdemeanor, from the highest to the lowest.

Crime, says Bouvier, adopting the definition given by Mr. Justice Blackstone, is "an act committed or omitted in violation of a



public law forbidding or commanding it." (Law Diction.) "Other crime" than "treason" or "felony" must then be some act which is not "treason" or "felony," but which, nevertheless, violates a public law, and is a crime for this reason. Every such act is embraced in the phrase "other crime," since the phrase is used without limitation or qualification.

What then is the rule by which to determine whether a crime charged, but which is not "treason" or "felony," is intended in the words "or other crime." To what law must reference be had in deciding whether a party charged with, and demanded for, a specific crime should be delivered up under the provision of the Constitution? This question has been the subject of frequent discussion, and not always answered in precisely the same manner.

**2. Theories of Construction.**— In 1790, the Attorney-General of Virginia advised Governor Randolph of that State not to comply with the request of Governor Mifflin of Pennsylvania for the delivery of three fugitive criminals; and one of the reasons was that the phrase "or other crime," as occurring in the Constitution, has "reference only to crimes similar in character to treason and felony, and that the act charged must be a crime, in that sense, under the laws of the State upon which the demand is made," and that the act charged in this case was not a crime of this character by the laws of Virginia, "but only a trespass or breach of the peace." (13 *American Law Review*, 6, p. 192.)

By some it has been held that the phrase applies only to such acts as were crimes under the laws of the several States when the Constitution was adopted. Others have claimed that it means only those acts that are criminal by the laws of the State from which the fugitive is demanded, as well as by the laws of the State making the demand. Others have adopted the theory that the phrase denotes only "offenses known as crimes at the common law, or recognized as such by the State of which the fugitive is demanded." Still others have held that the phrase embraces "all such acts as are made criminal by the laws of the State where they are perpetrated." (Hurd's *Habeas Corpus*, 2d ed., pp. 601, 602.)

The Attorney-General of Ohio, in his report, January 25, 1850, remarked: "In almost every State of the Union, the criminal code embraces offenses unknown to the common law, and peculiar to the State. An act not *malum in se*, nor the subject of punishment anywhere else, is often made criminal in the code of a particular State. It can hardly be supposed that the constitutional provision was intended for such offenses."

A conspicuous case, involving this question, occurred in 1839, when the Lieutenant-Governor of Virginia, acting as Governor, made a requisition upon Mr. Seward, then Governor of the State of New York, for the surrender of three persons, alleged to be in the latter State, as fugitives from the justice of the former, charging them by an affidavit with having, contrary to the laws of Virginia, feloniously stolen and taken away a negro slave, being the property of one Colley. Gov. Seward declined to order the arrest and delivery of the alleged fugitives, mainly on the ground, which he stated as follows, in his letter of September 16, 1839, to the Lieutenant-Governor: "After due consideration, I am of opinion that the provision applies only to those acts which, if committed within the jurisdiction of the State in which the person accused is found, would be treasonable, felonious, or criminal by the laws of that State." (*Seward's Works*, vol. 2, p. 452.) The act charged, though a crime in Virginia, not being such in the State of New York, the Governor accordingly refused to surrender the persons accused.

Substantially the same ground was subsequently taken by Governor Dennison, of Ohio, in reference to a requisition made upon him by the Governor of Kentucky, for the delivery of one Willis Lago, charged, in Kentucky, with having assisted a slave to leave and escape from her owner, which was a crime in that State, but not such by the laws of Ohio. On this ground the Governor refused to comply with the requisition of the Governor of Kentucky.

**3. Construction of the Supreme Court of the United States.**—The Supreme Court of the United States has, in two distinct instances, expressed its opinion as to the crimes for which a party may be demanded under the extradition provision of the Constitution.

The first case is that of *Kentucky v. Dennison*, 24 How. 66. This was an application by the State of Kentucky for a writ of *mandamus*, addressed to the Governor of Ohio, and commanding him to comply with the requisition of the Governor of Kentucky for the delivery of a fugitive from justice, charged with crime in the latter State. The court declined to grant the writ, holding that, "if the Governor of Ohio refuses to discharge this duty, there is no power delegated to the General Government, either through the judicial department or any other department, to use any coercive means to compel him."

Chief Justice Taney, however, in stating the opinion of the court, entered into a careful and elaborate exposition of the provision of the Constitution relating to inter-State extradition. He said :

"Looking at the language of the clause, it is difficult to comprehend how any doubt could have arisen as to its meaning and construction. The words 'treason, felony, or other crime,' in their plain and obvious import, as well as in their legal and technical sense, embrace every act forbidden and made punishable by the law of the State. The word 'crime' of itself includes every offense, from the highest to the lowest in the grade of offenses, and includes what are called 'misdemeanors,' as well as treason and felony."

Again, in another connection, the Chief Justice remarked :

"Looking, therefore, to the words of the Constitution — to the obvious policy and necessity of this provision to preserve harmony between States, and order and law within their respective borders and to its early adoption by the colonies, and then by the confederated States, whose mutual interest it was to give each other aid and support whenever it was needed — the conclusion is irresistible that this compact engrafted in the Constitution included, and was intended to include, every offense made punishable by the law of the State in which it was committed, and that it gives the right to the executive authority of the State to demand the fugitive from the executive authority of the State in which he is found ; that the right given to demand implies that it is an absolute right ; and it follows that there must be a correlative obligation to deliver, without any reference to the character of the crime charged, or to the policy or laws of the State to which the fugitive has fled."

The other case is that of *Taylor v. Taintor*, 16 Wall. 366. Mr. Justice Swayne, in delivering the opinion of the court, said : " The constitutional provision and the law of Congress, under which the arrest and delivery were made, are obligatory upon every State and a part of the law of every State. \* \* \* Every violation of the criminal laws of a State is within the meaning of the Constitution, and may be made the foundation of a requisition." (*Kentucky v. Dennison*, 24 How. 66 ; *Certain Fugitives*, 24 Law Magazine, 226.)

The language of the Supreme Court as to the scope of the constitutional provision, considered with reference to crime, is entirely explicit in both of these cases. The words " treason, felony, or other crime," were intended to include, and do include, all criminal offenses ; and, for any one or more of these offenses against its laws, any State has the right to demand the delivery of the offender from the State to which he has fled, and in which he is found.

Chief Justice Taney, in *Kentucky v. Dennison*, *supra*, said that the words " treason " and " felony " were introduced into the constitutional provision, " for the purpose of guarding against any restriction of the word ' crime,' and to prevent this provision from being construed by the rules and usages of independent nations in compacts for delivering up fugitives from justice." The intention was " to embrace political offenses against the sovereignty of the State, as well as other crimes ; and as treason was also a felony, it was necessary to use those words, to show, in language that could not be mistaken, that political offenders were included in it." According to this construction, the word " crime," which would have included " treason " and " felony," is not restricted in its import by being associated with these words in the provision, but was intended to embrace all other crimes than those specifically mentioned.

**4. Construction of State Courts.** — The courts of the several States have in proceedings on *habeas corpus* had repeated occasions to express their views in regard to the point under consideration. The following are examples to this effect :

(1.) In *The Matter of Clark*, 9 Wend. 212, the Supreme Court of the State of New York, Chief Justice Savage delivering the opinion, said : " With the comity of nations we have nothing to

do, unless perhaps to infer that the framers of our Constitution and laws intended to provide a more perfect remedy — one which should reach every offense cognizable by the laws of any of the States. The language is 'treason, felony, or other crime.' The word 'crime' is synonymous with the word 'misdemeanor,' 4 Black. Com., 5, and includes every offense below felony punishable by indictment as an offense against the public."

(2.) In *The Matter of Hayward*, 1 Amer. Law Jour. N. S. 271, the Superior Court of the city of New York said, in 1848: "It is immaterial to consider what is the nature of the offense charged against the prisoner, for we have only to consider whether it be a crime according to the law of the State from which the party is alleged to have been a fugitive."

(3.) In *The People, ex rel. Lawrence, v. Brady*, 56 N. Y. 182, the Court of Appeals said: "The word 'crime' in the clause of the Constitution, which has been quoted, embraces every act forbidden and made punishable by the law of a State, and the right to demand the surrender of fugitives from justice extends to all cases of the violation of its criminal law. \* \* \* The obligation to surrender for an act which is made criminal by the law of the demanding State, but which is not criminal in the State upon which the demand is made, is the same as if the alleged act was a crime by the law of both."

(4.) In *The Matter of John Leary*, 10 Ben. 197, Judge Choate held as follows: "The word 'crime' in the article of the Constitution relating to inter-State extradition and the Statute (Rev. Stat., sec. 5278), includes every act made criminal by the law of the demanding State, whether it was so at common law or not, even though made so by a law subsequent to the adoption of the Constitution and the passage of said act of Congress."

(5.) In *Brown's Case*, 112 Mass. 409, the Supreme Court of Massachusetts said: "The words of the provisions of the Constitution and laws of the United States, and of the Statutes of this Commonwealth, the history of those provisions, and the judicial expositions of them, conclusively establish that the authority of the Governor of this Commonwealth to order the delivery of fugitives from the justice of another State in the Union extends to a person appearing to be charged with *any* crime whatever in that State."

(6.) The same court, in *The Commonwealth v. Green*, 17 Mass. 515, 547, incidentally referred to the extradition clause of the Constitution, and then proceeded to say: "This is a perfect recognition of the independent sovereignty of the States in regard to crimes committed within their Territory, as well as of the local nature of crimes and punishments."

The obvious implication of this language is, that it is for each State to determine what shall be a crime within its own Territory, considered with reference to its right, under the Constitution, to demand the surrender of a person who has committed an offense against its laws.

As remarked by the court: "The right and duty of punishing offenses must necessarily be limited to the authorities against which the offenses have been committed." The object of extradition is to secure the exercise of this right.

(7.) In *The Matter of Fetter*, 3 Zab. 311, it was objected that the crime charged was not a crime within the meaning of the Constitution. To this objection Chief Justice Green replied: "Admitting the position taken by counsel in argument, that the offense specified does not constitute larceny at the common law, it is nevertheless certified by the Governor of California to be grand larceny under the laws of that State. It is, moreover, an offense of a highly immoral character, and, as appears by the bill of indictment, which must be regarded as *prima facie* evidence of the fact, is a *crime* by the law of the State of California."

(8.) In *The Matter of Peter Voorhees*, 3 Vroom, 141, Chief Justice Beasley spoke as follows:

"The category of offenses is treason, felony, or other crime. This clause, in the Articles of Confederation, instead of the term 'crime,' contained the expression 'high misdemeanor.' It is obvious this latter description was indefinite to the last degree. \*

\* \* \* But I am not aware that any jurist, in any age of the common law, has ever doubted as to the meaning of the word 'crime.' It is *nomen generalissimum*, and has always been considered as embracing every species of indictable offense. \* \*

\* \* In my opinion, the word 'crime,' with characteristic foresight, was selected, in lieu of the phrase 'high misdemeanor,' in order to extend the regulation to all classes of offenders, which alone would effect one of the principal objects in view — that of rendering the classification perfectly definite."

(9.) In *Morton v. Shinner*, 48 Ind. 123, the court held that the case of a person "charged in Illinois, with a crime which is neither treason nor felony, but is a misdemeanor punishable by fine not exceeding five thousand dollars," comes "within the Constitution and laws of the United States relating to the surrender or extradition of fugitives from justice, fleeing from one State to another."

(10.) In *The Matter of Hughes*, Phill. (N. C.) L., 57, it was held that "the constitutional requirement for the surrender of fugitives from justice applies to those charged with statutory as well as common-law crimes."

(11.) The Supreme Court of Georgia, in *Johnston v. Riley*, 13 Ga. 97, declared that "when the Governor of a State makes a requisition, under the Constitution of the United States, on the Governor of another State, for the return of a fugitive from justice, who had escaped from the former to the latter State, if the requisition is made with all requisite formalities, it is his imperative duty to comply, without inquiring whether the fugitive has committed a crime according to the laws of the State to which he fled."

(12.) The judges of the Supreme Court of Maine were, in 1837, requested to give the Governor of that State an opinion in regard to the demand for a person who had been indicted in another State for fraud committed therein in the sale of lands. The Judges in their answer said :

"In our opinion it is the duty of the executive of this State to cause to be delivered over to the agent of another State, at the request of the executive thereof, a citizen of this State, charged by indictment with the fraud before set forth, *which, being indicted in such State, may be presumed to be there regarded as a crime*, if the executive of this State is satisfied that such citizen has fled from justice from the State making the demand, and not otherwise." (24 American Jurist, 226.)

(13.) The return to the writ of *habeas corpus* in the case of *In re Greenough*, 31 Vt. 279, showed that Greenough was in custody under a warrant of the Governor of Vermont in compliance with a requisition from the Governor of Illinois, upon the basis of an indictment found in the latter State, charging him with obtaining, in Cook county of that State, money under false preten-

ses, which was a crime under the statute of the State of Illinois. It was urged in argument before the court that the words "treason, felony, or other crime," used in the Constitution, should be confined to crimes of great atrocity, and such as deeply concern the public safety, and are offenses at common law, and that to include the crime with which Greenough was charged as coming within the Constitution, would be an act of despotism.

The court rejected this construction of the Constitution altogether. The Judge, who delivered its opinion, said: "This provision in the Constitution and laws of Congress has received a practical, uniform construction from Maine to Georgia, from an early day in our judicial history, if indeed it can be said to admit of construction. It has also been the subject-matter of repeated judicial determination, and he must, I think, be a bold man, who at the present day is ready to hold that the subject-matter of the complaint against Greenough is not within the Constitution and laws of Congress. The language is broad, and the crime charged is within its letter, and I apprehend, equally within the reason and spirit of the provision."

These opinions of the Supreme Court of the United States, and of State courts, involve and settle two legal propositions: 1. That the words "treason, felony, or other crime," as used in the Constitution and in the law of Congress, embrace, within their meaning, *all* crimes, whether they are such at common law, or simply by legislative statute. 2. That it is immaterial whether the crime charged be a crime according to the laws of the State to which the demand is addressed, provided that it is a crime according to the laws of the State making the demand. This is sufficient, in the presence of the conditions specified, to establish the duty of surrender.

**5. Fugitive Slaves as Fugitives from Justice.** — The legislature of Maryland, in 1834, passed a law which made it a felony in a slave to "escape into the District of Columbia, or into any of the States of this Union, against the will and consent of his master and owner, with a view to escape from servitude." (Lewis Cr. Law, 260.)

An indictment, under this statute, was, in 1847, found in Maryland against one John Mark and other fugitive slaves as fugitives



from justice, charging them with a felony. Proceeding under the extradition provision of the Constitution, the Governor of Maryland demanded of the Governor of Pennsylvania the surrender of these slaves as fugitives from justice. Their offense consisted wholly in fleeing from the State of Maryland, in order that they might secure their own freedom, and not in any act done prior to the flight. The flight, for the purpose specified, constituted the whole crime. This manifestly was not such a case as the Constitution contemplates. That instrument does not regard the mere flight of the fugitive as a crime or any part of a crime, but simply looks upon it as the means of escaping the punishment due to a crime previously committed.

Governor Shunk, of Pennsylvania, refused to comply with the demand of the Governor of Maryland, on the ground that the Constitution of the United States and the law of Congress had made provision for the surrender of fugitives from *servitude*, and that no State legislation could evade that provision, or alter the character of the case so as to bring it under the provision for the surrender of fugitives from *justice*. The Governor, in his letter of May 5, 1847, to Governor Pratt, of Maryland, said that "the rightful remedy of the owner is under that clause of the Constitution and the act of 1793 which provides for delivering up persons held to service or labor, and that no act of State legislation can evade, alter, abridge or enlarge the provisions and remedies contained in the Constitution and laws of the United States relating to this subject." (Letter of Governor Shunk to Governor Pratt, May 5, 1847.)

The law of Maryland was plainly inconsistent with the Constitution of the United States in respect to the delivery of fugitive slaves, and did not fit that provision of the Constitution which relates to the delivery of fugitives from justice. The fugitive slave was to be "delivered up on claim of the party to whom such service or labor may be due," not as a criminal, but as the property of that party. The delivery restored the property to the owner. To deliver the slave to the State Government to be punished for his flight would not put him in the custody of the owner, as was intended by the Constitution, but would put him in the custody of the State Government, and thus defeat the direct end contemplated by the constitutional provision.

**6. Petty Misdemeanors.**—It was urged by counsel, in *The Matter of Peter Voorhees*, 3 Vroom, 141, that it cannot be supposed that it was intended that the extradition provision of the Constitution should apply to “all persons who might be guilty of the minor offenses, such as assaults, libels and the entire train of similar misdemeanors.” To this Chief Justice Beasley replied as follows :

“It is not probable that a State will ever require the surrender of offenders of this grade, but if the demand should be made, and the offense charged be indictable, it is not understood how such demand can be refused. The offense in such a case would be a public one, as much so as the commission of the highest crime, and it is embraced in the words of the Constitution. It is the right of the sovereignty whose laws have been violated, to decide what offenders it will pursue, and the State upon which the demand is made cannot rightfully call in question that decision. In practice there will be little danger of an abuse of this constitutional prerogative, and the possibility of such abuse is of but slight consideration, in comparison with the pre-eminently great advantage which will result from the limits of such prerogative being so clearly defined as to be in every respect unquestionable.”

As to what are called minor offenses, considered with reference to inter-State extradition, Governor Fairfield remarks : “The phraseology is ‘treason, felony, or other crime,’ not other crimes of a high and aggravated nature, but crimes in their absolute and unqualified sense.” (24 American Jurist, 226.)

It is one of the rules adopted by the executive authority in the State of Pennsylvania that requisitions upon other States or Territories for the delivery of fugitive criminals will not be issued “in cases in which the offense is of such a trivial character as to leave a doubt of the granting of a mandate thereon by the executive of other States or Territories.” There is no doubt about the power of the Governors of States and Territories to adopt and apply such a rule, since neither the Constitution nor the law of Congress makes it their duty to issue a requisition at all. The matter is left wholly with their discretion.

It will rarely, almost never, happen that a State will pursue a criminal into another State for a petty misdemeanor—that is merely a statutory crime of a very low grade; and hence the ob-

jection founded on the theoretical possibility of such a proceeding is practically of but little weight, certainly not of enough weight to require a change in the natural and obvious meaning of the words used in the constitutional provision. It assumes, as a fact, what is not at all likely to happen. One who has been guilty of a minor misdemeanor is not likely to flee from the State, in order to escape its punishment; and if he does so, then there is no probability that the State will pursue him and bring him back for trial and punishment.

If, however, a State should demand the surrender of such a criminal, and supply the conditions specified, then his delivery would be obligatory. No injustice would be done to him by such a proceeding, since his extradition would simply bring him within the jurisdiction of the State whose laws he had violated, and thus place him just where he would have been if he had not fled from justice. This is what extradition does in every case, whatever may be the grade of the offense. It simply prevents the offender from gaining any immunity by flight; and this surely is not unjust.

**7. Extraordinary Cases Supposed.**— Judge Cooley, in an article published in the January number of the *Princeton Review*, 1879, p. 163, says :

“ But it is always possible that the peculiar ideas and sentiments prevailing in one State may lead to statutes for the punishment as crimes of acts which the ideas and sentiments of another State would tolerate, and perhaps approve. It may be admissible, perhaps, to consider the probable result by the suggestion of cases which, though extreme and improbable, may not be far removed from others, of the possibility of which we may be readily convinced.”

“ Suppose a State, after many years' trial of a prohibitory liquor law, should come at last to the conclusion that the true remedy for the evils of intemperance was to punish the drinking of intoxicating liquors, and should thereupon pass laws making it a felony. Is it probable that the other States would surrender fugitives for punishment under such laws? Suppose a State were to tolerate and sanction the institution of polygamy, and, in order to protect it, should enact that the departure of a woman from a polygamous household should be punished with stripes or with imprisonment. Is it likely that the executive of another State to which an offender against such a law had fled would recognize

her as a case which could have been within the contemplation of the Convention when, as one of the securities of the Union, they agreed that no State should permit itself to become an asylum for offenders against the laws of another?"

After stating these suppositions, Judge Cooley proceeds to remark: "That while statutory offenses are no doubt embraced, yet that if a State were to do a thing so extraordinary as to provide for the serious punishment of some act which the prevailing sentiment of the Union did not recognize as properly punishable under human laws, the case might well be regarded as one which presented no claim which inter-State comity could recognize by the surrender of fugitives from it, and which, therefore, might reasonably be treated as one the Constitution did not embrace."

It is true that each State, being sovereign within its own territory, is the sole judge as to what shall by it be regarded as a crime within that territory, and that, so far as the question of mere power is concerned, a State may make that a crime which is not such in another State, and ought not to be such in any State. Every State has the power to enact barbarous laws for the government of its own inhabitants.

The Constitution of the United States, in its extradition provision, as in all its other provisions, is, however, a *practical* instrument, and, as such, it deals with things as they are, and not with mere speculative suppositions as to what is possible; and hence the latter are not to be taken as furnishing a rule or test for its interpretation. It is assumed in the Constitution that each State has the right to be the judge of its own criminal legislation, subject to whatever limitations may be imposed by this instrument; and, in providing for the surrender of fugitive criminals that they may be tried and punished by the State against whose laws they have offended, the Constitution, as a practical instrument, makes no exception in respect to any class of crimes. It takes whatever hazard there is in the mere possibility that a State might in its criminal legislation outrage the moral sense of the other States. It does not furnish any remedy against this mere possibility.

It is to be remembered, moreover, that the Constitution could not make the laws of the surrendering State the rule for determining what shall be regarded as an extradition crime in the demand-

ing State, without greatly impairing the value of the provision, and making it promotive of discord and contention rather than harmony among the States. The simple object of the provision is to aid each State in the administration of its own laws, leaving it to judge what those laws shall be. But if a State, asked to make the surrender of a fugitive criminal, is, so far as the performance of this duty is concerned, also to be the judge of what those laws shall be, then, as remarked by Chief Justice Taney, in *Kentucky v. Dennison*, 24 How. 66, it would be better to omit the provision altogether and leave the whole matter to be settled by State comity, without any constitutional regulation.

This theory would open the way for constant "controversy and irritating discussion" between the States. It would, on the subject of extradition, make one State the judge of the propriety of the criminal legislation of another State, and compel the latter to conform its laws to those of the former, in order to avail itself of the remedy, with the right in the former to judge of the question of such conformity.

The bare possibility that a State may enact criminal laws which, in the judgment of its sister States, ought not to be enacted, is surely not a sufficient reason for thus construing the remedy which the Constitution has actually provided. It will be time enough soberly to consider this possibility, and provide for any evil that may be involved in it, when it becomes a fact of such an aggravated nature as to demand an adequate remedy. Till then, it is not worthy of being taken into the account in construing the extradition provision of the Constitution.

## CHAPTER V.

## THE CRIMINAL CHARGE.

The next question that claims attention is the *charge* of crime, as a condition precedent to the obligation of delivering up a fugitive criminal.

**1. The Provision of the Constitution.**—The Constitution speaks of the fugitive as “a person *charged* in any State with treason, felony or other crime.” The term “charged” is undoubtedly to be taken in the legal sense. In regard to it Judge Cooley says :

“This means that he shall be charged in due form of law, in some proper judicial proceeding instituted in the State from which he is a fugitive. This charge is to be the foundation for the demand and for the warrant of surrender; and it cannot be sufficient unless it contains all the legal requisites for the arrest of the accused and his detention for trial if he were then within the State.” (Princeton Review, January, 1879, p. 165.)

The question, to be determined in extradition, is not whether the party is guilty, but whether he is legally charged with crime. In *The Matter of Clark*, 9 Wend. 212, Chief Justice Savage, in answer to the affidavit of the prisoner denying the truth of the charge against him, remarked : “But whether he is guilty or not is not the question to be decided here. It is whether he has been properly charged with guilt, according to the Constitution and act of Congress. \* \* \* It is not necessary to be shown that such person is guilty; it is not necessary, as under the comity of nations, to examine into the facts alleged against him constituting the crime; it is sufficient that he is charged with committing the crime.”

The question whether the charge is true or not belongs to the judicial power of the State or Territory demanding the alleged fugitive from its justice. And yet that State or Territory must, in order to get possession of the fugitive and subject him to a trial with a view to settle this question, legally charge him with

having committed a crime therein. The Constitution makes this indispensable, without prescribing the manner in which the charge shall be made.

It is not necessary that the charge should precede the escape of the fugitive, since it may be just as validly made afterward ; but it is necessary that it should set forth a *prima facie* case of crime. (Governor Fairfield's Opinion, 24 Am. Jurist, 226.)

2. **The Act of Congress.** — The first section of the Act of February 12, 1793 (1 U. S. Stat. at Large, 302), reproduced as section 5278 of the Revised Statutes of the United States, provides that " whenever the executive authority of any State or Territory demands any person as a fugitive from justice, of the executive authority of any State or Territory to which such person has fled, and produces a copy of an indictment found or an affidavit made before a magistrate of any State or Territory, charging the person demanded with treason, felony, or other crime, certified as authentic by the Governor or chief magistrate of the State or Territory from whence the person so charged has fled," then the prescribed steps for his delivery shall be taken.

This statute defines the manner in which the charge is to be made, and in this respect supplies the omission of the Constitution. It must be made by " an indictment found " against the party demanded, or by " an affidavit made before a magistrate of any State or Territory " who is legally competent to take an affidavit. The statute further provides for the production, with the demand, of " a copy " of the indictment or affidavit making the charge, " certified as authentic " by the executive authority of the State or Territory from which the person has fled.

The design of these provisions is, in a legal way, to bring to the knowledge of the executive authority on which the demand is made this form of *prima facie* evidence that a crime has actually been committed, sufficiently conclusive to justify the action of that authority in the arrest and delivery of the accused party. This evidence consists wholly in legally authorized paper documents presented to this authority for its consideration, and, if the documents contain the proper requisites, for its affirmative action in compliance with the demand.

The evident theory of the statute is that the legal accusation,

namely, an indictment or affidavit, charging the party with the commission of crime, that would have justified his arrest and commitment to prison, or holding him to bail, in the State or Territory in which the crime is charged to have been committed, had he not fled therefrom, shall be sufficient to authorize his arrest in the State or Territory where he has sought refuge, and his removal therefrom to the State or Territory having jurisdiction of the crime. An indictment found by a grand jury, or a complaint under oath before a magistrate competent to administer an oath and issue a warrant of arrest, is the established American manner of making a legal charge of crime, and thus initiating criminal proceedings against a party; and Congress saw fit to adopt this manner of making the charge in the extradition of fugitive criminals.

No mention, in the law of Congress, is made of an "information" as a mode of charging crime; and yet in some of the States it is a legal mode of making such a charge in respect to certain crimes, and, as to these crimes, is the equivalent of an indictment by a grand jury. An information, being in its form and substance similar to an indictment, is a charge of crime filed in the office of the clerk of a court, by the proper law officer of the government, generally a district attorney, who acts *ex officio*, without the intervention of a grand jury. And, where this method is provided for by the laws of a State, an information takes the place of an indictment in respect to the crimes to which it is applicable, and serves the same purpose, so far as bringing the accused party to trial is concerned.

There is no doubt that a charge of crime in this form, where it is legal according to the laws of a State, though not technically an indictment, and not in express terms mentioned in the law of Congress, comes within the meaning of the law, and would and should be so regarded for the purpose of extradition, if properly made. The obvious intent of the law is that the party shall be charged with crime in the usual manner in which such charges are made in the State where the crime is alleged to have been committed. The proceeding begins, not with the executive authority of the demanding State or Territory, but with the judicial branch of the government thereof, and until proceedings are here commenced, resulting in a charge of crime, the executive



authority has no power to act in the case. Chief Justice Taney, in *Kentucky v. Dennison*, 24 How. 66, 104, alluding to the provision of the Constitution on this subject, said that the executive authority of a State is "not authorized by this article to make a demand unless the party was charged in the regular course of judicial proceedings."

It was held, in *Ex parte White*, 49 Cal. 443, that the Governor of California "has no authority to surrender a fugitive who has committed a crime in another State, unless judicial proceedings have been commenced against him for the crime in the State in which it was committed."

The Supreme Court of Iowa, in *The State v. Hufford et al.*, 28 Iowa, 391, held "that a charge of the crime against the person to be arrested and delivered up must be made in the State where the offense was committed, in the form of an indictment, information, or accusation known to the law of such State, before some court, magistrate, or officer thereof." Judge Beck, in stating the opinion of the court in this case, said "that, to authorize the arrest, there must be a charge pending against the accused in another State or Territory."

Ordinarily, the charge of crime, whether by indictment or information, or by an affidavit before a magistrate will be immediately followed by the issue of a warrant for the arrest of the accused party, if the accusation be deemed sufficient to justify an arrest. The law of Congress, however, does not specify the issue of such a warrant or the production of a copy thereof, as a condition precedent to the right of making a demand or the obligation to deliver up the alleged fugitive. It is enough that the party has been charged with crime in the manner prescribed, whether a warrant for his arrest has been actually issued or not; and this is always indispensable.

**3. The Two Forms of the Charge.** — The charge may be made by a regular indictment, or by an affidavit before the proper magistrate, either of which is legally valid for the purpose in question. The statute makes no distinction between them as to their efficacy for this purpose.

And yet these two forms of charging a crime are by no means

different names for precisely the same thing. Governor Seward in his letter of July 14, 1841, to the Governor of Georgia, thus sharply draws the contrast between an indictment and an affidavit:

"I may, nevertheless, remind your Excellency that there is a wide difference between an affidavit charging crimes and an indictment. The former is a hurried proceeding. It is the act of a single individual, a voluntary accuser. He may be ignorant, prejudiced, malicious, corrupt, and even depraved. Often, if not always, he is an aggrieved accuser. There are manifest reasons, then, for scrutinizing his complaint."

"An indictment, on the contrary, is the solemn verdict of a grand jury, selected upon the grounds of their intelligence and virtue, sworn and charged diligently to inquire and true presentment make upon evidence, and with comprehensive powers to collect testimony, and a right to have legal advice in making deductions of law. The grand jury is a regularly constituted tribunal. A majority must hear a complaint. A majority must pronounce an indictment to be a true bill, and their verdict must be rendered in open court. The indictment as preferred by the prosecuting officer may be regarded as a charge submitted by him to the grand jury, and it is not until they have inquired, upon oath, into all the facts and circumstances of the case proven to them by competent witnesses, that they can affirm the charge and give it force and effect." (Seward's Works, vol. 2, p. 528.)

This difference between the two methods of charging crime, so forcibly stated by Governor Seward, does not by any means destroy the legal efficacy of an affidavit as one of the methods, since the law for good reasons has made it such a method; but it does constitute a reason why, when the charge is in this form, it should be carefully scrutinized by the executive authority whose duty it is to deal with the subject. The *a priori* presumptions, that attach to an indictment, are not equally applicable to an affidavit.

Judge Andrews, in stating the opinion of the Court of Appeals in *The People, ex rel. Lawrence, v. Brady*, 56 N. Y. 182, said: "It cannot be held that any less degree of certainty is admissible in an affidavit charging conspiracy than is required in an indictment for the same offense. If any distinction exists in this respect, the affidavit should be more full and explicit." The prisoner in this

case was discharged because, upon a critical examination of the affidavits that formed the basis of the proceeding, it did not, in the judgment of the court, appear that these affidavits really charged him with any crime known to the laws of Michigan, from which State he was alleged to be a fugitive.

**4. Certification of the Charge.** — The provision of the law is that "a copy" of the indictment found or the affidavit made before the proper magistrate, charging the crime against the person demanded, shall be produced with the demand, and that it shall be "certified as authentic by the Governor or chief magistrate of the State or Territory from whence the person so charged has fled."

It is hence not necessary to produce the original indictment or affidavit. It is sufficient to produce "a copy" thereof, certified in the way prescribed.

This certification, by the authority mentioned, is the legal guaranty as to the existence of the indictment or affidavit, as the case may be, and as to the fact that the "copy" of the same produced is a true and genuine copy, and not a fraud or a forgery, so that the Governor of a State or Territory to whom the demand is addressed, and who is asked to make the delivery, will, in legal effect, have before him the original indictment as found, or the original affidavit as made, in the State or Territory from which the demand proceeds. The certification does not in any respect change the character or contents of the indictment or affidavit. It authenticates the "copy" as a true and veritable exhibit thereof.

The law assumes that the executive who performs this duty will assure himself of the facts to which he thus officially certifies. It does not prescribe the manner by which he shall be so assured, but, assuming that he will be no party to a fraud or trick, it leaves this to his discretion and integrity. He, of course, cannot honestly certify to the "copy" until properly informed on the subject. Indeed, in legal contemplation, he himself makes this "copy."

The certification, being properly made, is *conclusive* evidence as to the correctness of the "copy" of the indictment or affidavit, and as to the existence of one or the other in accordance with the

laws of the State or Territory in which the charge is made. In *The Matter of Manchester*, 5 Cal. 237, the court held that "the Governor of the State issuing the requisition for the fugitive is the only proper judge of the authenticity of the affidavit, and the judge, on *habeas corpus*, cannot go behind this action to inquire whether the affidavit was a forgery."

So, also, in *Kingsbury's Case*, 106 Mass. 223, it was held that "the certificate of the Governor of another State, in demanding of the Governor of this Commonwealth to surrender a fugitive from justice, that a copy, produced with the demand, of a complaint made on oath to a person styled a trial justice of the peace in said State, charging the fugitive with a crime, is authentic, sufficiently authenticates the capacity of the person as a magistrate authorized to receive the complaint, within both the U. S. St. of 1793, ch. 7, § 1, and Gen. Sts., ch. 177, § 1."

Chief Justice Taney, in *Kentucky v. Dennison*, 14 How. 66, 106, having quoted the act of Congress, proceeded to say: "It will be observed that the judicial acts which are necessary to authorize the demand, are plainly specified in the act of Congress, and the certificate of the executive authority is made conclusive as to their verity when presented to the executive of the State where the fugitive is found."

This is evidently in accordance with the design of the law. It meant to make the certification sufficient to establish the points to which it refers, and not leave them open to debate before the Governor to whom the requisition is addressed.

The usual form of making this certificate is to incorporate it in the requisition as a part thereof, reciting that it appears from the annexed copy of the indictment or affidavit, which is authentic and duly authenticated in accordance with the laws of this State, that A. B. stands charged with crime, etc. This covers the whole ground, and makes the requisition conclusive as to the points certified to, so that the executive to whom the requisition is addressed has no right to go behind the certification and inquire into its correctness.

Section 2973 of the Revised Statutes of Arkansas, 1874, provides that, where a party has been arrested by a judicial magistrate before a demand for his delivery, and examined by such magistrate, the Governor of that State, if in his opinion the ex-

amination contains sufficient evidence to warrant the finding of an indictment, shall forthwith notify the Governor of the State or Territory in which the crime is alleged to have been committed of the proceedings against the person arrested, and that he will be delivered on demand without *requiring a copy of the indictment to accompany the demand.*

A similar provision, in like circumstances, is contained in section 4 of chapter 44 of the General Statutes of Colorado, 1883, and in section 9 of chapter 44 of the Compiled Laws of Kansas (Dassler), 1881.

These provisions are manifestly unconstitutional, because inconsistent with the law of Congress. This law provides that the demanding executive must produce, with the demand, a copy of an indictment found, or an affidavit made before a magistrate in any State or Territory, charging the crime, and that this copy must be certified as authentic by the demanding executive, as the condition precedent to the obligation of delivery. Congress plainly intended that this should be the rule by which the delivery should be governed, and that no delivery should be made without a compliance with this rule. A State law, superseding the necessity of a certified copy of the indictment, on the theory that the evidence in the opinion of the executive is sufficient to warrant an indictment, is clearly not consistent with the law of Congress.

##### **5. The Reality and Sufficiency of the Criminal Charge.—**

The question whether there is any charge of crime against a party, and, if so, then whether the charge is sufficiently made, must, in the first instance, be considered and determined by the Governor of the State or Territory who makes the demand. He must, in the very nature of things, decide both of these questions, and if he answers either or both in the negative, he will then see no occasion for making any demand.

So, also, the Governor to whom the demand is addressed, in the event that one is made, must pass judgment upon the same questions. He must read and examine the papers presented to him, and determine whether they are conformable to the requirements of law. The law requires that, in one or the other of the ways specified, a crime shall be charged, as the condition precedent

to the obligation of delivery; and whether, in the case presented to him, this has been done or not, is a question which he must determine, since it is necessarily involved in that of his legal duty in the premises. He cannot intelligently decide the latter question, without determining the former.

Judge Gilbert, in stating the opinion of the General Term of the Supreme Court of New York in *The People, ex rel. Draper, v. Pinkerton*, 17 Hun, 199, said: "The duty of the Governor of this State to issue the rendition warrant was imperative. Having performed the *quasi* judicial function of determining that the act of Congress had been complied with by the Governor of Massachusetts, the only remaining part of his duty was ministerial only." That is to say, having, by examination, decided that the case, as presented in the papers, came within the provision of the law, then he had only to do what the law directed to be done. This "*quasi* judicial function" preceded and was necessary to the "ministerial" part of his duty.

Chief Justice Taney, in *Kentucky v. Dennison*, 24 How. 66, 154, referred to the necessity that the charge of crime should be made "in the regular course of judicial proceedings," and then proceeded to say: "It is equally necessary that the executive authority of the State, on which the demand is made, should be *satisfied by competent proof* that the party was so charged." The Governor is to be "satisfied" on this question of fact; and the only way in which he can be thus satisfied is to examine the contents of the certified copy of the indictment or affidavit, as the case may be, and thereby ascertain whether a crime is charged therein.

The object in setting forth the crime, not simply by its title, but in the material facts and circumstances which constitute a legal description of the offense alleged, and which must be stated in order to make the charge a legal accusation, is to enable the Governor to judge whether a crime has been charged with sufficient explicitness and certainty to justify the arrest and surrender of the accused party. The certified copy of the indictment or affidavit is by the law made the source of his light on this point; and while he has no right to impeach its verity, unless he has reason for regarding it as a forgery, he certainly has a right to judge of its character and contents.

The courts, whenever they have had occasion to consider the question in proceedings on *habeas corpus*, have uniformly adhered to the general rule that the requirements of the law in relation to the charge of crime should be strictly complied with, as indispensable to the legality of the demand, and the resulting obligation of delivery ; and so far as they have differed at all, the difference has related to what is involved in these requirements.

The Supreme Court of Texas, in *ex parte Thornton*, 9 Texas, 635, after stating the law on the subject, proceeded to say :

“ But so far from its appearing on the face of the warrant that such copy has been presented to the executive, and that the warrant was issued in consequence thereof, it appears, on the contrary, that the executive acted on the representation of the executive of the State of Arkansas, to the effect that the relator stood charged with the crime of forgery in that State. These were altogether insufficient to give the Governor jurisdiction in the case. The representations of the executive of the demanding State are of no effect, unless supported by a duly authenticated copy of the indictment found or the affidavits made.”

The prisoner in this case was discharged because, under the law, the Governor of Texas, upon the evidence before him as to the commission of a crime, had no authority to issue a warrant for his arrest.

In *The Matter of Clark*, 9 Wend. 212, Chief Justice Savage, having referred to the law of Congress on the subject, said : “ In order therefore to give the Governor of this State jurisdiction in such a case, three things are requisite : 1. The fugitive must be demanded by the Executive of the State from which he fled. 2. A copy of the indictment found or an affidavit made before a magistrate, charging the fugitive with having committed the crime. 3. Such copy of the indictment or affidavit must be certified as authentic by the executive. If these prerequisites have been complied with, then the warrant of the Governor has properly issued, and the prisoner is legally restrained of his liberty.”

Holding that the case, as presented to the court, showed such a compliance, the Chief Justice further said that “ the Governor of New York had full power and authority to issue his warrant, to direct Clark to be arrested and delivered over to the agent of the State of Rhode Island.”

Judge Russell, City Judge of New York, having, in *Solomans' Case*, 1 Abb. Pr. (N. S.), 347, adverted to the extradition clause of the Constitution and the law of Congress to carry it into effect, said in regard to the latter: "The act is summary in its effect, and must be strictly complied with; otherwise a warrant issued under it would be absolutely void." Referring to the conditions stated by Chief Justice Savage, *supra*, he further said that they had not been complied with in this case, and hence that "the Governor of New York had no authority to issue his warrant to arrest the prisoners, and direct that they be delivered over to the agent of the State of Louisiana." On this ground he ordered them to be discharged.

In *The Matter of Rutler*, 7 Abb. Pr. (N. S.), 67, Judge McCunn, of the Superior Court of the City of New York, said that the return to the writ of *habeas corpus* shows that "the prisoner was arrested and is detained by no authority whatever." The mere requisition of the Governor of Tennessee, "of itself and without more, affords no authority or justification for his imprisonment." The affidavit of Mr. Hyatt "merely embodies a hearsay statement, communicated by telegraph, that the prisoner is charged in Tennessee with an offense against the laws of that Commonwealth. This paper, apart from being nothing more than the repetition of a rumor, is fatally defective otherwise, in not incorporating an authenticated copy of the charge or indictment against the prisoner in Tennessee." There being no legal cause for his detention, the court ordered him to be discharged.

In *Ex parte Pfitzer*, 28 Ind. 440, it was held by the court that the papers, accompanying the requisition of the Governor of Illinois upon the Governor of Indiana, "did not satisfy the requirements of the act of Congress upon the subject of the rendition of fugitives. A copy of the indictment must be produced before the Governor of the State is authorized, upon the requisition of the Governor of another State, to issue his warrant for the arrest of the fugitive." Such, as the court held, was not the fact in this case, and hence the warrant was held to be illegally issued and void.

These cases are examples of the uniform doctrine of courts that the charge of crime, made in the way prescribed by the law of Congress, must exist as a fact, and the evidence of this fact,



as also prescribed by Congress, must accompany the demand for the delivery of the alleged fugitive, or the demand will have no legal character whatever, and create no obligation of delivery. The mere statement of the demanding executive that the party demanded is charged with crime, unaccompanied by the evidence provided for by Congress, is insufficient. It proves nothing. The prescribed evidence must be produced, and it must establish the fact alleged in the demand.

As to the question whether the certified copy of the indictment or affidavit shows that the conduct set forth is a crime, Judge Cooley makes the following observations :

“ It is a rule of evidence that the authorities of one State may assume that the common law of another State is like their own, but that they cannot take judicial notice what innovations have been made by statutes of another State upon its common law. Therefore, if the indictment or affidavit contain the requisites of a charge of a common-law offense, it is presumptively a charge of crime in due form of law. If, on the other hand, it charges as a crime conduct that would not be criminal at common law, the executive of another State cannot know that such conduct is criminal until the statute is shown which makes it so. But this can seldom cause embarrassment, because the published volumes of the laws of other States are generally made evidence by statute, and the Governor has only to look into the proper book in his own or the State library to ascertain what he is required to know on that subject.” (Princeton Review, January, 1879, p. 166.)

This supposes that an indictment or affidavit may be so defective as really not to charge any crime. It further supposes that where the offense charged is a purely statutory crime, the Governor may and should examine the law of the demanding State, in order to ascertain whether the action set forth is an offense against that law, if the facts are as charged. If the offense charged is a common-law offense, then, as a rule of evidence, the presumption is that it is such a crime by the common law of the demanding State.

If the averments of the indictment or affidavit, though substantially charging a crime, are lacking in technical accuracy, and for this reason raise a doubt as to their legal sufficiency, who is to solve that doubt? Judge Cooley asks this question, and cites several cases in which the matter was remitted to the courts of

the demanding State. (*Johnston v. Riley*, 13 Ga. 97; *The State v. Buzine*, 4 Harring. 572; *The Matter of Voorhees*, 3 Vroom, 141; and *Davis's Case*, 122 Mass. 324.)

Chief Justice Beasley, responding, in *The Matter of Voorhees*, 3 Vroom, 141, to the objection "that although the false pretenses are set forth in the pleading, there are no statements in it to show how such pretenses were made operative in the production of the fraud which is alleged," said:

"It would be a complete answer to this position to remark, that there is no rule of criminal pleading which requires such manifestation, and that many of the approved precedents, in this respect, accord with the form criticised. But, to avoid misconception, it is deemed best to resolve the question on the more general ground that this is a matter of pleading with which the authorities of this State have no concern. It is clear that this indictment does contain a charge of the commission of crime against the laws of New Hampshire, and that is all that is necessary. It is for the judicial tribunals of the latter State to decide upon the sufficiency of such charge as a matter of technical pleading."

So, also, in *Davis's Case*, 122 Mass. 324, the court held that it could not discharge the prisoner on account of merely "formal defects in the indictment," since this belonged to the question of "technical pleading," and was to be disposed of "in the State in which the indictment was found." Judge Cooley remarks that "in Delaware this view was adhered to so strictly that a fugitive was surrendered, notwithstanding the Superior Court of the State, after having examined into the facts of the case, had reached the conclusion that the alleged crime was nothing but a civil trespass." (*The State v. Schlemm*, 4 Harring. 577.) It is difficult to reconcile such a decision with the plain letter and intent of the law, since the defect was not a matter of "technical pleading," but a failure to charge a crime.

The New York Court of Appeals, in *The People, ex rel. Lawrence, v. Brady*, 56 N. Y. 182, having before it the papers that were presented to the Governor of that State, examined these papers, and among other things, held as follows: 1. That the affidavits were not sufficient to authorize the issuing of the executive warrant. 2. That they did not necessarily charge a crime,

as the thus obtaining property was not, by the common law, in all cases a crime. 3. That it was not made to appear that the fugitive was guilty of any offense punishable by the laws of Michigan, which was the demanding State. 4. That if a conspiracy to do a wrongful act affecting the property of another is an offense by the laws of said State, although neither the end nor the means are criminal, that fact should have been shown by the affidavits. 5. That the court cannot take judicial notice of the law of that State, and in the absence of proof, the presumption is that the courts of that State agree with our own in declaring and interpreting the common law.

The prisoner was discharged, in this case, on the ground of the insufficiency of the affidavits, upon which the arrest was founded, to set forth a crime according to the laws of Michigan. The court assumed its right to pass upon this question, and did not remit it to the courts of Michigan, and in so doing, it in effect held that the Governor of the State had made a mistake in the issue of the warrant for arrest and delivery.

The Judges of the Supreme Court of Maine, in their opinion given to the Governor of that State, said: "In our opinion it is the duty of the executive of this State to cause to be delivered over to the agent of another State, at the request of the executive thereof, a citizen of this State charged by indictment with the fraud before set forth, *which, being indicted in such State, may be presumed to be there regarded as a crime*, if the executive of this State is satisfied that such citizen has fled from justice from the State making the demand, and not otherwise." (24 Amer. Jurist, 226.) The point, to be here observed, is that these Judges make the fact of an indictment the basis of a presumption that the fraud set forth therein is a crime according to the laws of the demanding State sufficient to justify the arrest and delivery, without further proof showing this fact.

Judge Westbrook, in *The Matter of Briscoe*, 51 How. Pr. 422, said:

"Briscoe was indicted in the State of Georgia for the fraudulent conversion of property intrusted to him as a commission merchant, to be sold. As the act of 1793 makes the evidence of the right to demand the fugitive 'the copy of the indictment found,' and such copy was produced to the Governor of this State,

it is unnecessary to examine the question whether or not the alleged offense charged in the indictment is one known to the laws of our State, and if not, whether or not proof should have accompanied the papers, showing that it was a crime under the laws of the State of Georgia. In *The Matter of Lawrence* (56 N. Y. 182), before referred to, the Court of Appeals, in demanding evidence that the alleged offense charged in the affidavit was a crime under the laws of Michigan, put it upon the ground that it did 'not appear that an indictment had been found against the relator,' and 'the fact that an inferior magistrate has issued a warrant of arrest upon the same proof as was presented to the executive of this State, does not justify the inference that a legal crime was charged in the affidavits.' As the case before us is directly within the law of Congress, our conclusion is that the indictment produced is sufficient evidence that the party is charged with a crime known to the laws of Georgia, and that no valid exception to the order of the Governor exists on this ground."

The ruling and the reasoning of Judge Westbrook, in this case, proceed upon the supposition that an indictment of itself sufficiently settles the fact that the crime charged is a crime according to the laws of the demanding State. The New York Court of Appeals, in *The Matter of Lawrence*, referred to by Judge Westbrook, said: "It does not appear that an indictment has been found against the relator, and the question arises whether the *affidavits* charge him with the commission of a crime in the State of Michigan." The court held that they did not, and for this reason discharged the prisoner.

The head-note in *The Case of Greenough*, 31 Vt. 279, reads as follows: "When the fugitive is charged with crime by an affidavit, and it appears clearly from the whole affidavit that no crime has been committed, it seems that a court, upon *habeas corpus*, may properly discharge the prisoner, notwithstanding the executive upon whom the requisition is made has granted a warrant upon which he has been arrested, but *aliter*, when the prisoner has been indicted in the State from whence the requisition comes." This, as to the question whether a crime has been charged, gives to an indictment a presumptive character not possessed by an affidavit.

6. The Conclusions. — The conclusions, in respect to the fact

and the sufficiency of the criminal charge, derivable from this examination of the subject, are the following :

(1.) The authorities all agree in the absolute necessity of a strict compliance with the requirements of the law of Congress. A crime in the demanding State or Territory must, in that State or Territory, be charged against the alleged fugitive, either in the form of an indictment or information where this is allowable, or in that of an affidavit before a magistrate who is competent by law to take affidavits.

(2.) The evidence of the existence of such a charge, in accordance with the laws of the demanding State or Territory, is a copy thereof certified to be authentic by the Governor of the State or Territory from which the person so charged has fled, and produced with the requisition for his arrest and delivery. This certification is conclusive evidence to this effect, and is hence not to be disputed on the question of fact.

(3.) The charge, whether in the form of an indictment or that of an affidavit, must set forth the essential facts and circumstances of the act or acts alleged as constituting the crime charged. Every crime is a particular crime, and legally to charge its commission is to state the act or acts in the circumstances of time and place, by which it was committed. This must be done with sufficient explicitness and fullness to show that, upon the assumption of the truth of the charge, a crime has been actually committed.

(4.) If the crime charged is an offense at common law, then, as a rule of evidence, the presumption, in the absence of proof to the contrary, is that it is also crime in the demanding State.

(5.) If, however, the crime be merely a statutory offense, then the laws of the demanding State may and should be consulted by the Governor asked to make the delivery, in order to ascertain whether a crime has really been charged ; and it is proper in such a case that the laws alleged to be violated should be set forth in the charge as the authorities of one State do not take judicial notice of the laws of another State.

(6.) If the charge be in the form of an indictment, the presumption from this fact is that the crime charged is a crime in the demanding State or Territory.

(7.) If there are "technical defects" in an indictment, which are mere matters of pleading, and do not affect the substance and

sufficiency of the indictment, considered as containing a charge of crime, then these defects are to be disposed of by the courts of the demanding State or Territory when the party or parties shall be brought to trial, and do not constitute a reason why the demand should not be complied with, or for a discharge on *habeas corpus*, provided a crime is really charged.

(8.) As to the question whether a crime against the laws of the demanding State or Territory is charged in the indictment or affidavit, so as to supply the ground of the obligation of delivery, the authorities of the State or Territory to which the requisition is addressed, including the Governor in the first instance, and the courts thereof in the second instance when proceeding by *habeas corpus*, with all the papers before them, have the right to inquire and determine, not whether the accused party is actually guilty, but whether he has been charged with crime in due form of law.

This question is not wholly a matter to be determined by the authorities of the demanding State or Territory. It belongs equally to the authorities of the State or Territory asked to make the delivery. The Governor of such State or Territory must, in the first instance, consider and determine the question, in order to decide whether it is his duty to issue his warrant for the arrest and delivery of the party demanded, and if he has issued such warrant, and the party, being arrested, sues out a writ of *habeas corpus*, as he would have a right to do, then the court issuing the writ must determine the question, in order to decide whether it shall discharge him from the arrest or remand him to custody.

## CHAPTER VI.

## THE FLIGHT FROM JUSTICE.

**1. The Words of the Constitution.** — The language of the Constitution is that “a person charged in any State with treason, felony, or other crime, *who shall flee from justice and be found in another State*, shall on demand of the executive authority of the State *from which he fled*, be delivered up, to be removed to the State having jurisdiction of the crime.”

The words, here placed in italics, relate to the flight from justice. They are words of description, and as such state a fact which forms an essential part of the case, and which must be in every case of extradition authorized by the Constitution. It is not enough that the party is, in a proper judicial proceeding, charged “with treason, felony, or other crime,” since this of itself does not make the case specified. Nor is it enough that he is thus charged in one State and “found in another State,” since this does not present the case stated in the Constitution.

The Constitution uses the words “who shall flee from justice,” that is to say, from the justice of the State in which he is charged with crime, and in order to flee from the justice here referred to, he must flee from that State. If he has not, as a matter of fact fled from the State, then the provision has no application to him. He is to be delivered up, if at all, upon the “demand of the executive authority of *the State from which he fled*.” He is to be removed “to the State having jurisdiction of the crime,” that is to say, the State making the charge, from whose justice he has fled by fleeing from the State.

The Constitution further speaks of this person as being “found in another State,” and puts the fleeing specified and the being thus found in immediate connection, making the latter the sequel of the former. He flees and is thus found. The language is not “who shall flee from justice *or* be found in another State,” so that either fact would suffice for his extradition. Both facts — the fleeing from the charging and demanding State, and the

being found in another State — must co-exist in the same case, or the case will not be the one described in the Constitution.

As to the evidence by which this question of fact shall be determined, so as to have the fact established and the delivery effected, the Constitution provides no rule. The mere fact that a person is in a given State charged with crime against its laws does not prove that he has fled therefrom, since he may be still in the State; and so the fact that a person thus charged is found in another State does not necessarily show that he has fled from the State making the charge, and to the State in which he is found, since, within the time covered by the charge, he may not have been within the former State and without the latter State at all, and if so, then he may not have fled from one of these States to the other.

The flight from justice and the being found in another State than that in which the crime is charged to have been committed, present a distinct fact in the case, not identical with the charge, and not necessarily involved in it or proved by it. And yet this fact exists in the case stated in the Constitution, and must hence be shown to exist when the provision is practically applied for the purpose of extradition.

**2. The Words of the Law of Congress.** — The statute of Congress provides that “whenever the executive authority of any State or Territory demands any person *as a fugitive from justice*, of the executive authority of any State or Territory *to which such person has fled*, and produces a copy of an indictment found or an affidavit made before a magistrate of any State or Territory, charging the person demanded with treason, felony or other crime, certified as authentic by the Governor or Chief Magistrate of the State or Territory *from whence* the person so charged *has fled*, it shall be the duty of the executive authority of the State or Territory *to which such person has fled*,” to cause him to be arrested and delivered up as provided in the statute.

The case, as here recited and as based upon the words of the Constitution, is that of a person who, being charged with crime in one State or Territory, has fled therefrom, in the character of “a fugitive from justice,” to another State or Territory. His thus fleeing makes him “a fugitive from justice:” and this is entirely distinct from the crime with which he is charged. It



follows after the crime, but is no part of it; and yet it is material to the case as stated in the statute, and must be in every case to which the statute is applicable.

The provision is definite, clear, and explicit as to the charge of crime, and as to the certified evidence of the charge; but, on the question of fact whether the person charged is a fugitive or not from one State or Territory to another State or Territory — the former being the State or Territory in which the crime is charged to have been committed, and the latter the State or Territory to which he fled, — no provision is in express terms made for its determination, and no rule of evidence is prescribed by which the question is to be settled. And yet the law assumes that it will be settled in each case of its application.

**3. The Meaning of Flight from Justice.** — The Constitution speaks of the party as one “who shall flee from justice,” and of the State in which the crime is charged as “the State from which he fled.” So, also, the law of Congress speaks of him “as a fugitive from justice,” as having “fled” from a State or Territory, and as having “fled” to a State or Territory.

These descriptive terms are intended to designate a fact. What then is that fact? A part of the fact evidently consists in bodily locomotion, by which the person in the exercise of his own will, and by his own choice, removes himself from the State or Territory in which he is assumed to have committed a crime, to some other State or Territory. He leaves the one and goes to the other. He is not removed from the one to the other by a legal process, since this would be no fleeing, on his part. He himself does the fleeing, and that too by choice, and is hence the voluntary agent of his own flight.

This, however, is not the whole fact in the case, since he is assumed to go away “as a fugitive from justice.” He takes himself out of the jurisdiction of the State or Territory, in order to escape its justice for a crime which he is conscious of having committed. He knows that if he were to remain, he would be liable to arrest and trial, and, if convicted, to punishment for this crime; and, in order to escape this liability, he flees, goes away, and removes himself to a place where, as he supposes, the same liability

will not exist. He hopes in this way to detach himself from the legal consequences of a criminal offense.

Such, in general terms, is undoubtedly the meaning of the flight from justice. The phrase is descriptive of what criminals usually do, after they have committed offenses; and, in this particular case, it is a flight or fleeing from one State or Territory, to another State or Territory. The following authorities show the construction placed upon this phrase in specific cases:

Governor Fairfield, of Maine, in the case of *Certain Fugitives*, demanded by the Governor of Massachusetts, in 1838 (24 Amer. Jurist, 226), alluded to the doctrine that if a person is charged with crime in one State and found in another, this will be sufficient both to constitute and prove the fact of fleeing from justice and then proceeded to say:

“To show that this position is untenable let us suppose a case. A person commits an offense (say larceny), in this State, where he continues subsequently to reside for several years, engaged in his usual avocation, the offense being a matter of public notoriety, and no one attempting in any way to disturb him by a prosecution. He then removes to the State of Georgia, with his family and property, going away not clandestinely, but openly, in the day-time, and by the usual mode of conveyance. He continues his residence in Georgia for several years, pursuing his regular business there, and demeaning himself in all respects as a good citizen. Can this man properly be considered as a fugitive from justice, and should the authorities of Georgia surrender him to be returned to this State to be tried on an indictment, procured, perhaps, by a personal enemy, and for an offense committed some twenty years before? This may be a strong case, but it tests the principle involved. It is admitted that he is guilty of the crime of which he stands charged, and he is found within another jurisdiction, and if this be regarded as sufficient, according to the argument of counsel, then the person, in the case supposed, must be delivered up, the Governor having nothing to do but to see that the copy of the indictment is duly authenticated. I cannot concur in the supposed correctness of these views, but, on the contrary, am of the opinion that all the circumstances should be inquired into in relation to the commission of the offense, the subsequent conduct of the accused, the time and manner of his leaving the State having jurisdiction of his offense, etc., in order to determine the question whether he has fled to avoid a prosecution.”

The Governor further said in these cases:

"I am clearly of the opinion that when one is conscious of having committed 'treason, felony, or other crime' in one State, and leaves that State, knowing that by remaining he is subject to a prosecution, a sufficient time not having elapsed, or other circumstances occurred to remove all reasonable apprehension of a prosecution, he may fairly be regarded as a fugitive from justice, within the meaning of the fourth article of the Constitution."

The visible fact here presented is the *leaving* the State in which one has committed a crime, under circumstances that, by the ordinary rules of common sense applied to human conduct, imply that at least one of the reasons for leaving the State was to escape its justice. The fact that the party is charged with crime makes a *prima facie* case against him; and the leaving, as described by Governor Fairfield, shows that the object was to escape justice and hence makes the party a fugitive from justice.

The affidavit, in *Kingsbury's Case*, 106 Mass. 223, showed that the prisoner lived in Boston, that she went to the State of Maine, and there did the acts complained of and alleged to constitute a larceny, and that soon afterward, and before the larceny was known, she returned back to Boston. She was by the court regarded as a fugitive from justice and remanded to the custody of the officer holding her. The court held that "to constitute a fugitive from the justice of a State, within the meaning of U. S. St. of 1793, ch. 7, and Gen. Sts., ch. 177, it is sufficient that the person, there charged with crime, has gone beyond its jurisdiction, so that there has been no reasonable opportunity to prosecute him since the facts were known, and it is immaterial that he has gone to the place of his domicile."

The fact that the party lives in the State to which he has returned does not, according to this ruling, change his character as a fugitive from justice, if going into another State and there committing a crime, he so withdraws therefrom as to give no reasonable opportunity for a prosecution against him after the crime becomes known. The presumption of law is that he sought to evade the justice of that State, and his going back to his own home will not remove this presumption. His place of ordinary residence, whether in the State to which he goes, or in that from which he goes, does not affect the question. Such is the doctrine of this case.

The facts in *Adams' Case*, 7 Law. Rep. 386, which came before the Superior Court of the city of New York in 1844, were these : Adams, being a citizen of Ohio, was charged in the city of New York with obtaining money by false pretenses. He came to New York on a bridal tour some months after the commission of the offense for which he was indicted. He suddenly left and went to Philadelphia, as was claimed by him, on business, and then returned to his home in Ohio. After this the indictment was found against him, and being demanded as a fugitive from justice, he was delivered up by the Governor of Ohio, and brought back to New York. A writ of *habeas corpus* was sued out in his behalf ; and at the hearing thereon he claimed that he had not fled within the meaning of the Constitution and the law.

Judge Vanderpoel, the full court sitting with him at the time, held that his flight from justice was sufficiently shown by these facts, and in regard to this point he said :

“ If a man within a State secretly commits a crime and suddenly departs, the crime not being discovered till months, or if you please, a year after his departure, though he may have left for purposes other than fleeing from the justice of the State against which he offended, yet he surely might be treated and proceeded against as a fugitive from justice. The consciousness of his having committed the crime, of his being amenable to the laws of the State against which he offended, might and would probably be regarded as the motive for going out of its limits, and form a legitimate basis for an executive requisition and surrender.”

The fact that the purpose to escape justice was not the sole reason for the departure, after the commission of an offense, does not, according to this statement, make it the less true that the party is to be deemed a fugitive from justice. It is sufficient if the facts reasonably show that this was one of the reasons.

In *The Matter of Voorhees*, 3 Vroom, 141, Chief Justice Beasley said : “ A person who commits a crime within a State, and withdraws himself from such jurisdiction, without waiting to abide the consequences of such act, must be regarded as a fugitive from the justice of the State whose laws he has infringed. Any other construction would not only be inconsistent with good sense and with the obvious import of the word to be interpreted in the con-

text in which it stands, but would likewise destroy, for practical purposes, the efficacy of the entire constitutional provision."

The withdrawal in the circumstances stated, without waiting to abide the legal consequences of the criminal act, is itself, according to this ruling, an act of flight from justice. The circumstances, in which it is done, give it this character.

In *Simmons v. The Commonwealth*, 5 Binn. (Pa.) 617, it was held that a person stealing goods abroad, and coming into Pennsylvania, cannot be there indicted for the crime, but is to be regarded and treated as a fugitive from justice.

Where a fugitive from justice has been delivered up by the Governor on whom the demand was made, allowed bail, forfeited his bail and again becomes a fugitive, he retains his character as such, and the Governor may order a second arrest and delivery. (*The Matter of Hughes*, Phil. (N. C.) L. 57, and *In re Greenough*, 31 Vt. 279.)

The case of *In re John J. Patterson*, in 1877, came on *habeas corpus*, before Judge Humphreys, of the Supreme Court of the District of Columbia, at chambers. Patterson was at the time a Senator of the United States from South Carolina, and in attendance upon the sessions of the Senate. He was demanded by the Governor of that State as a fugitive from its justice, and was arrested in the District under a warrant issued by the Chief Justice of the Supreme Court of the District, in the exercise of the authority given in section 843 of the Revised Statutes of the United States relating to the District of Columbia.

The case appears on the record as cause No. 12,182 Crim. This record shows that Patterson, in his application for a writ of *habeas corpus*, placed the alleged illegality of his arrest on various grounds. One of these grounds was the allegation that he was not a fugitive from justice, but was a Senator of the United States from South Carolina, and as such had resided in the District of Columbia for more than two years next preceding; and that during the last four years he had repeatedly been in South Carolina without any attempt on the part of the authorities of the State to arrest him. The Judge, on the hearing of the case, allowed evidence to be introduced in proof of this allegation, so far as the facts were not disclosed by the record itself.

The result of the hearing was a discharge of the prisoner from

the arrest, but the record does not show on what ground the order was based. There was no official reporter in attendance, and the case is not mentioned in Mac Arthur's reports, since these reports contain only the cases decided at the General Term of the Supreme Court of the District.

The *Washington Post* of December 7, 1877, however, contains an unofficial report of the language of Judge Humphreys in giving his decision in the case. According to this report, the Judge said: "The papers in this case show that the State of South Carolina commissioned Patterson as its Senator, and the commission as Senator antedates the requisition. The petitioner was sent to Washington by the people of South Carolina as their Senator. Can he then be said to be a fugitive from justice? \* \* \* \* A party sent to do a particular act cannot be said to be a fugitive from justice by the authorities that commissioned him whilst his mission is not ended."

It appears from this language that Judge Humphreys did not regard Patterson as a fugitive from justice, whether this was or was not the sole reason for his discharge. The circumstances very strongly showed that his withdrawal from South Carolina was not a flight from justice, but simply in the discharge of his duties as a Senator of the United States from that State.

Governor Cullom of Illinois, was, in 1878, requested, by the Governor of Pennsylvania, to order the arrest and delivery of Michael Gaffigan and Michael Merrick, citizens of Illinois, as fugitives from the justice of the former State, on the basis of an indictment found against them in Pennsylvania in 1865. He issued his warrant for their arrest; but, before their delivery, and on subsequent consideration of the whole subject, he came to the conclusion that they were not fugitives from justice, and revoked his warrant, and ordered their discharge. (Gov. Cullom's Opinion.)

In this opinion, Governor Cullom states at large the facts which appeared at the hearing of the case, and which, being summarily stated, were to the following effect: That the prisoners, having resided in the county where the crime was alleged to have been committed, soon after the alleged commission, left the State without any attempt to conceal their destination, and came to

Illinois, and in 1867 took up their residence in Springfield in that State, where they had ever since remained as upright citizens, retaining the names they had borne in Pennsylvania; that during the long period of some twelve years there was frequent and familiar intercourse by correspondence and otherwise between them and their respective families and other persons and families resident in the place where the crime was charged to have been committed, and that on their part this intercourse was without any disguise, so that the place of their residence in Illinois was well known at the place and in the county where the crime was committed; and that notwithstanding these facts, and this lapse of time, no attempt until the requisition in 1878, which was thirteen years after the finding of the indictment, had been made by the authorities in Pennsylvania to secure their arrest and extradition.

Governor Cullom, in the light of these facts, raised the question whether he had any right to look beyond the papers that were presented as the basis of the requisition. The conclusion to which he came is stated as follows :

" After full deliberation I am satisfied that, as to the fact of the accused being a fugitive from justice, each Governor must judge for himself. The fact is not determined by any judicial act or record, but is *in pais* purely. Whether a person is *charged* with crime is another matter, provable by records that import absolute verity and therefore cannot be inquired into. But, whether he has fled from the State wherein the charge was made is an open question for the determination of which the law has made no provision in terms. I therefore proceed with regard to this question upon that settled principle that where the law imposes upon any officer the duty of performing an act upon the happening of any event or the proof made of any fact, and at the same time does not create any tribunal for the determination of the condition precedent, such officer is required to judge for himself."

Acting upon this principle, and applying his own judgment to the question whether the accused parties, in the light of the facts as they had been shown by proof, were fugitives from justice within the meaning of the Constitution and the law, Governor Cullom decided that they were not such, and on this ground revoked his warrant of arrest and ordered the prisoners to be dis-

charged. He also maintained that, even if their leaving the State of Pennsylvania, as they did, would be sufficient to make them fugitives from justice, the facts of the ensuing twelve years would show that this *status* had ceased to attach to them.

The Constitution assumes that the Governors of States will be men of common sense, and that they will exercise it in respect to the meaning of fleeing from justice, so as to secure the end intended, on the one hand not straining the words beyond their natural and proper import, and on the other hand not so curtailing that import as to defeat the end. The question, as to what is to be regarded as a flight from justice, is plainly one of common sense, and is to be decided in each particular case by the facts of that case.

**4. Evidence of the Flight.** — Both the Constitution and the law of Congress, by making the flight of the accused person a material part of the case, necessarily assume that some evidence of this fact will and must be presented, in the first instance, to the demanding Governor, and, if he deems it sufficient, then by him to the Governor to whom he addresses his requisition. This evidence, in respect to both Governors, must be legal evidence, not mere hearsay, or suspicion, or mere rumor, and must hence be under oath, and must at least be sufficient to create a *prima facie* case of flight. Without such evidence, it cannot be known to either Governor that such a fact exists at all; and until this is reasonably known there is no occasion for any action on the part of either.

The obvious presumption of the Constitution and the law is that no executive of a State or Territory will make a demand for the delivery of a fugitive criminal until, in addition to the charge of crime against him, he is satisfied by reasonable evidence that the party is a fugitive from the State or Territory, and has sought refuge in the State or Territory to whose executive the demand is to be addressed. The mere fact, in the absence of such evidence, that the party is charged with crime, makes no case for his action. He needs to know more. He needs, in making a demand, to know that the party is a fugitive, as well as an accused criminal; and the law of Congress provides for him no method or rule by which he shall gain this information.



So, also, the Governor of the State or Territory upon whom the demand is made, needs the like information as to the same fact, in order that he may conform his conduct to the requirements of the Constitution and the law. The papers presented to him, as the basis of the demand, must supply this information in a credible form. He is not assumed to know any thing about the case beforehand; and it is not made his duty to seek the evidence of the fact. The party demanded is not yet arrested and not yet found; and the question whether a process shall be issued for his arrest turns, in part, upon the question whether, being charged with crime, he is a fugitive from the demanding State or Territory, and upon a sufficient presumption that he is to be found in the State or Territory to whose executive the demand is addressed.

In regard to the question whether the accused party is a fugitive, Judge Cooley remarks: "The Governor ought to have some showing under oath that the person demanded is in truth a fugitive from the State whose requisition is before him. This showing is as essential as is the authentic evidence of the charge of crime, and is demanded not more by the fair import of the Constitution than by justice. Without it, as was shown in the case of the Mormon prophet, a man has no security against being sent to distant States to answer charges from which he could never have fled, because he was never there." (Princeton Review, January, 1879, p. 168.)

Judge Withey, of the United States District Court for the Western District of Michigan, giving his opinion in the case of *In re Samuel D. Jackson*, used the following language:

"Now, it is manifest that, before the executive of Michigan is authorized to issue his warrant to cause to be arrested and secured a person charged in another State with crime, it should be shown, by evidence making a *prima facie* case, that such person has fled from that demanding State. This should be shown by competent evidence, as the fact of fleeing lies at the foundation of the right to issue a warrant of extradition. The certificate of the demanding Governor is no evidence of the fact. Neither the act of Congress nor any rule of evidence makes his certificate evidence of such fact. \* \* \* The mere fact that a citizen of Michigan has been charged with crime and indicted in another

State is not legally sufficient to authorize the arrest and extradition of such citizen. \* \* \* It is as essential to the right of arrest and extradition to prove to the satisfaction of the Governor of Michigan that the person charged with crime has fled from justice as to prove that he is charged with crime in such other State. The latter is sufficiently proved in either of two methods provided by the law of Congress, by copy of an indictment, or by an affidavit made before some magistrate, charging the person demanded with having committed a crime, certified as authentic by the demanding Governor. No provision is made as to the method of proving the person demanded as a fugitive has fled from justice. But when the Constitution says a person charged with crime, who shall flee from justice, shall be delivered up, the converse is that a person charged with crime who shall not have fled from justice shall not be delivered up to be removed. \* \* \* The evidence that the person has fled from justice must not only be satisfactory to the Governor, but must be legally sufficient before the executive authority can be exercised. He cannot act upon rumor, nor upon the mere representation of a person, nor upon the demanding Governor's certificate. It should be sworn evidence, such as will authorize a warrant of arrest in any other case." (2 Flip. 183.)

Jackson was discharged on the ground that the warrant of the Governor of Michigan for his arrest failed "to recite or state any conclusion of the executive issuing it that the person charged has fled, and recites only that the demanding Governor has so represented," which was not deemed "legally sufficient to authorize an arrest and extradition." The Judge affirmed the "common principle that a process of arrest must be legally sufficient on its face."

The Judges of the Supreme Court of Maine, in their opinion given in 1837 to the Governor of that State, said: "In our opinion it is the duty of the executive of this State to cause to be delivered over to the agent of another State, at the request of the executive thereof, a citizen of this State, charged by indictment with the fraud before set forth, which being indicted in such State may be presumed to be there regarded as a crime, *if the executive of this State is satisfied that such citizen has fled from justice from the State making the demand, and not otherwise.*" (24 Amer. Jurist, 226.)

These Judges express no opinion as to how the Governor shall be thus satisfied. They simply declare that he must be satisfied

that the party charged and demanded as a criminal is also a fugitive from justice, and assume his right to determine this question of fact for himself.

An instructive case in relation to this point came before the United States Circuit Court in Illinois in 1842. (*Ex parte Smith* [the Mormon prophet], 3 McLean, 121.) Smith was charged, by an affidavit made before a magistrate in Missouri, with being accessory beforehand to an attempt to murder one Lilburn W. Boggs, who swore to his belief that Smith was thus accessory, and also that at the time of the affidavit he was "a citizen and resident of the State of Illinois," but did not locate him in Missouri at the time of the alleged offense. On the basis of this affidavit the Governor of Missouri made a requisition upon the Governor of Illinois, in which he represented Smith to be a fugitive from justice, and demanded his delivery; and the latter issued his warrant for the arrest and surrender of the accused, declaring therein that "the said Joseph Smith has fled from the justice of said State and taken refuge in the State of Illinois."

The legality of these proceedings was, upon the return to a writ of *habeas corpus*, considered by Judge Pope, of the United States District Court, acting as Circuit Judge. Smith, by his counsel, offered to show by the affidavits of several persons that he was not in Missouri at the time of the alleged offense, but was in Illinois at the time, and distant more than three hundred miles from the place of the crime as fixed by the affidavit of Boggs.

The Judge decided to hear these affidavits, but did not pass upon the question of their admissibility, holding the affidavit of Boggs to be insufficient to justify the requisition by the Governor of Missouri, and the warrant of arrest and surrender by the Governor of Illinois. One of the grounds upon which he discharged the prisoner is the fact that the affidavit did not locate him in Missouri at the time of the offense, and hence did not place him under the jurisdiction of that State, or in circumstances to commit a crime against its laws or flee from its justice. It really charged no crime against Smith as committed by him in the State of Missouri.

The recitals made by the Governor of Illinois in his warrant of arrest and surrender were not supported by the facts set forth in

the affidavit of Boggs; and hence, as the Judge held, they could not "be received as evidence to deprive a citizen of his liberty, and transport him to a foreign State for trial." He added that "the proceedings in this affair, from the affidavit to the arrest, afford a lesson to Governors and Judges, whose action may hereafter be invoked in cases of this character."

These authorities sustain the obviously reasonable and just principle that the papers presented to the Governor of a State or Territory, as the basis of a demand, must, by legal evidence, make a *prima facie* showing of the fact that the party claimed, in addition to being charged with crime, has fled from the State or Territory making the charge and the demand. The Governor to whom the demand is addressed has no right, in the absence of this showing, to issue his warrant for the arrest of the accused party. And, as to the question whether in a given case such a showing is made or not, he must necessarily be the judge for the purpose of his own action.

The fact that neither the Constitution nor the law of Congress specifies the evidence upon which a person charged with crime shall be deemed to have fled from justice, does not dispense with legal evidence to this effect, either in demanding or in delivering up the accused party. Nor is the judgment or conclusion of the demanding executive necessarily the rule by which the delivering executive must be governed. If it were, there would be no need of furnishing any evidence to the latter other than that contained in the conclusion of the former. The latter has as much right to judge of the evidence as the former, and he must judge of it in order intelligently to perform the duty assigned to him.

Mr. Hurd says: "There must be an actual fleeing from justice and of this the Governor of the State of whom the demand is made, as well as of the State making it, should be satisfied. This is commonly shown by affidavit." (Hurd's Habeas Corpus, 2d ed., p. 612.)

The Attorney-General of Pennsylvania, in 1845, in *Hall's Case*, 6 Penn. Law Jour. 412, gave it as his opinion that the Governor of that State should not surrender the alleged fugitive, on the ground that there was no affidavit showing the fact of actual flight from the State of New York.

Governor Cullom, of Illinois, in 1878, in the cases of *Gaffigan*

and *Merrick*, who were demanded as fugitives from justice by the Governor of Pennsylvania, in his response thereto said :

"But whether he [the party charged with crime] has fled from the State wherein the charge was made is an open question for the determination of which the law has made no provision in terms. I therefore proceed with regard to this question upon that settled principle that, where the law imposes upon any officer the duty of performing any act upon the happening of any event or the proof made of any fact, and at the same time does not create any tribunal for the determination of the condition precedent, such officer is required to judge for himself." (Governor Cullom's Opinion.)

This is precisely what Governor Cullom did in these cases. Holding that the parties, charged with crime in Pennsylvania, were not shown to be fugitives from the justice of that State, he declined to order their delivery.

Judge Gilbert, in delivering the opinion of the court in *The People, ex rel. Draper, v. Pinkerton*, 17 Hun, 199, said : "The gist of the proceeding is the apprehension of a person in this State for a crime which he is charged with having committed in Massachusetts. The charge that he committed the crime in that State, coupled with the fact that he is found in this State, is conclusive upon the question whether he is a fugitive from justice. \*

\* \* And I think that the fact that he is found in another State is sufficient evidence that he has fled from the State where he committed the crime."

The first remark, to be made in regard to this language, is that it has no application to the case as it exists when the demand is made to the Governor of a State or Territory, and when he is called upon to decide whether he will issue his warrant or not. At that moment the alleged criminal is not yet arrested and not found anywhere, and hence his personal presence in the State or Territory is not a fact known to the Governor as the means of drawing the inference that he has fled from the State or Territory in which he is charged with crime. The mere charge of crime, if that be all, does not of itself furnish a particle of proof that he has thus fled. The charge, whether in the form of an indictment or that of an affidavit, may locate him in the State or Territory when and where the crime is alleged to have been committed,

but if it contains no evidence of flight, it does not locate him anywhere else. For aught that appears he may, at this stage of the proceeding, be still in the State or Territory where he is charged with having committed the offense. What the Governor needs to know by some evidence, before he issues his warrant of arrest, is that the accused party has fled, and this he cannot know from a mere charge of crime. There must be added to the charge some evidence of flight, in order to make the case which both the Constitution and the law state.

A second remark is that the charge of crime in one State and the actual finding of the accused party in another State, in the sense of arresting them there, do not necessarily show that he is a fugitive from justice. The case of Smith, the Mormon prophet, is a striking illustration of this remark. He was charged with crime in Missouri, and arrested on the charge in Illinois, and yet he had not been in Missouri at all, and of course had not fled therefrom. So also Jones and Atkinson were charged with crime in Massachusetts, and demanded as fugitives of the Governor of Iowa, and yet they were not in Massachusetts, but were in Iowa at the time of the alleged offense. (*Jones and Atkinson v. Leonard*, 50 Iowa, 106.)

The fact that a party, charged with crime in one State, is found in another State, may create a presumption that he is a fugitive from justice, but it is by no means conclusive, even after he is arrested. If it were conclusive, then in the language of Judge Cooley:

“A person might be arrested in any State and surrendered to another for trial on the mere showing that in the latter State an indictment had been found or a complaint made in due form against him. By this means one might be punished for constructive presence and participation in an offense committed, if at all, at a great distance, as was actually attempted in the noted case of the Mormon prophet Smith, who was arrested as a fugitive from a State where he had never been, and was ordered to be surrendered for trial for offenses against laws to which he had never been subject. Such a construction would be intolerable.” (*Princeton Review*, January, 1879, p. 164.)

And yet there is no escaping this result, if we adopt the theory that a mere charge of crime in one State and the mere finding of

the accused party in another State, without any other evidence, conclusively establish the fact that he is a fugitive from the justice of the former State. This theory put into practice by Governors would open the way for gross abuses of the extradition provision of the Constitution. Judge Cooley is right in saying that "such a construction would be intolerable."

As to the question whether the accused party is at the time in the State or Territory from which the surrender is demanded, there is by no means the same necessity for evidence. The fact that the Governor of a State has, upon what he deems adequate information, requested the Governor of another State to deliver up a fugitive criminal, would, as to the presence of the criminal in the latter State, be sufficient to justify the issue of a warrant for his arrest, provided that the alleged criminal was properly charged with crime in the former State, and he was shown by legal evidence to be a fugitive therefrom. If he is not there, no injustice or harm will be done by the issue of the warrant and the search for him; and if he is there, then he ought to be arrested, and for this purpose the warrant ought to be issued. The issue of the warrant will test the question whether he is or is not within the jurisdiction of the State on which the demand is made.

**5. State Laws as to the Flight.** — Some of the States, in the absence of any legislation on the subject by Congress, have passed laws in relation to the evidence upon which an accused party shall be deemed a fugitive from justice.

The General Statutes of Massachusetts, chapter 177, section 1, require that the demand upon the Governor of that State for the delivery of an accused party, and also an application to the Governor to make such a demand upon the Governor of any other State or Territory, shall be "accompanied by sworn evidence that the party charged is a fugitive from justice."

Section 95 of the Revised Statutes of Ohio contains a similar provision; and the same is true of section 4174 of the Revised Code of Iowa.

Such legislation by States is designed to furnish a guide to the Governors thereof, whether in demanding or delivering fugitive criminals, in determining the question whether the party accused is in fact a fugitive from justice. And, inasmuch as

Congress has made no provision on the subject, and Governors must of necessity decide this question, whether in making demands or complying with them, it is difficult to see any constitutional objection to the legislation. It furnishes them a guide in determining a question of fact, where otherwise they would be left to follow their own judgments.

The "sworn evidence," thus provided for by statute, may be supplied by the indictment or affidavit which charges the crime, or in a distinct and separate affidavit or affidavits; and in either case it must set forth the fact that the party demanded and accused has fled from the justice of the State or Territory in which the crime is alleged to have been committed.

In *Kingsbury's Case*, 106 Mass. 223, it was held not to be necessary "that the sworn evidence required by the Gen. Stats., ch. 177, § 1, to accompany the demand of the Governor of another State on the Governor of this Commonwealth for the surrender of a fugitive from justice, should be annexed to the demand." It is sufficient if it accompanies the demand, without being actually annexed to it.

The law of Indiana provides that no citizen or resident of that State shall be surrendered under pretense of being a fugitive from justice from any other State or Territory, where it shall be clearly made to appear to the judge holding the examination provided for by this act, that such citizen or inhabitant was in the State at the time of the alleged commission of the offense, and not in the State or Territory from which he is pretended to have fled, and that, in such case, the judge holding the examination shall discharge the person arrested, and forthwith report the facts to the Governor. (Rev. Stats. of Indiana, § 1605.)

The intention of this statute is to exclude, from being surrendered, all persons who are simply fugitives by construction, and not such in point of fact. The question involved in the statute will be considered under the next head.

**6. Fugitives by Construction.** — It has sometimes been claimed that, although the accused party was not *personally* and *actually* in the State or Territory at the time of the commission of the alleged offense, for which he is demanded, he may, nevertheless, for the purpose of extradition, in certain cases, be regarded



as having been constructively there, and hence as being constructively a fugitive from justice.

The cases referred to are those in which a party resident in one State procures the death of another party resident in another State by sending poison to be administered by an innocent agent, or in which a person standing on one side of a State line shoots across the line and kills a person on the other side, or where murder is perpetrated by sending an infernal machine from one State into another, or in which the crime of obtaining goods or property by false pretenses is committed through the medium of a letter written and sent by a party in one State to a party in another and different State. The act, in these cases, is done in one State, and the effect takes place in another State.

All such cases raise a question which has been much debated in the courts, and in regard to which the decisions are not uniform, as to *where* a crime is legally to be deemed committed, whether in and against the jurisdiction where the offender actually was at the time of the criminal action, or in and against the jurisdiction in which the action was completed in its results, the two jurisdictions not being the same. Mr. Bishop, in his *Criminal Law* (6th ed.), sections 112-116, discusses this point and cites the authorities in regard to it. It is not necessary, for the purpose in hand, to answer this question.

If we assume that the offense is always committed where the offender was at the time of his action, then, if he has not fled from the jurisdiction, there is no need of the extradition process for his capture, and if he has fled, then the case comes within the provisions of the Constitution and the law.

In *The People v. Adams*, 3 Denio, 190, it was held that a person actually in Ohio at the time of the offense could commit a crime in the State of New York, and that, upon his coming *voluntarily* into the latter State, he could be there tried and convicted for that offense. This, however, does not meet the case, since the party was supposed to come voluntarily into the State of New York. Extradition is not a voluntary coming, but a forcible one. The question then is whether the Constitution and the law of Congress provide for the extradition of an offender from the State where he actually was at the time of the offense,

and where he continues his domicile, to another State where, in legal contemplation, the crime is assumed to have been committed, although he was not actually there.

There ought to be no difficulty in answering this question. The rule for construing the Constitution, laid down by the Supreme Court of the United States in *Martin v. Hunter's Lessee*, 1 Wheat. 304, is to the following effect: "The words are to be taken in their natural and obvious sense, and not in a sense, unreasonably restricted or enlarged." Applying this rule to the extradition clause of the Constitution, as well as to the law of Congress for its execution, no one can for a moment doubt that the case, and the only case, for which provision is made, is that of a person who is charged with crime in a State or Territory, being assumed to be there at the time of the offense, and who actually, not by supposition, not by a legal fiction, not by "a constructive rendering," but actually in point of fact, flees from that State or Territory and is found in another. This is the whole case as set forth in the words used.

To make the terms "flee" and "fled" mean an actual and voluntary escape by locomotion in one class of cases, and simply staying where one is, without any locomotion, in another class of cases, is to make the same words mean exactly opposite things in precisely the same connection. This is assuming altogether too much for the flexibility of language. If we can thus trifle with the words of the Constitution, and force a meaning into them or out of them, at pleasure, in order to meet an exigency or attain a supposed good, then the instrument has no fixed meaning, and the interpreter becomes its maker.

The truth is that the Constitution contains no provision for the extradition of a person who was not present in the State where he is assumed to have committed a crime, and who has not actually fled from the justice of that State, and who is not, as a fugitive, found in another State, and who does not choose to go to that State. Whether the framers of the Constitution thought of such a case or not is not the question. They certainly have put no such case into the instrument, and construction cannot put it there without altering the instrument.

In the case of *Ex parte Smith*, 3 McLean, 121, an attempt was made to extradite a man, on the charge of crime, into a State

where he had not been at all, and from which, of course, he had not fled, and but for the interposition of a court, discharging the prisoner on *habeas corpus*, the attempt would have been successful, without the least warrant for it in the Constitution.

The plaintiffs in the case of *Jones and Atkinson v. Leonard*, 50 Iowa, 106, had been indicted in the State of Massachusetts, for the crime of cheating by false pretenses with the intent of fraud. The false pretenses charged were contained in a letter written by them in the State of Iowa to certain parties in Boston, and on the basis of this charge their surrender was demanded of the Governor of Iowa by the Governor of Massachusetts.

It was claimed, at the hearing of this case, that these plaintiffs, although not actually in Massachusetts at the time of the alleged offense, were constructively there, and that they had constructively fled therefrom. The court rejected this theory altogether, holding that "a citizen and resident of Iowa who is charged with having been constructively guilty of a crime in another State, upon which a requisition is based, but who never in fact has fled therefrom, is not a fugitive from justice within the meaning of the Constitution." The court said: "It is difficult to see how a man can flee who stands still. That there must be an actual fleeing, we think, is clearly recognized by the Constitution of the United States."

The Supreme Court of Alabama, in *Mohr's Case*, 2 Alabama Law Journal, 457, said:

"It is clear to our mind that crimes, which are not actually but are only constructively committed within the jurisdiction of the demanding State, do not fall within the class of cases intended to be embraced by the Constitution or act of Congress. Such at least is the rule unless the criminal afterward goes into such State and departs from it, thus subjecting himself to the sovereignty of its jurisdiction. The reason is not that the jurisdiction to try the crime is lacking, but that no one can in any sense be alleged to have fled from a State into the domain of whose territorial jurisdiction he has never been corporally present since the commission of the crime. And only this class of persons are embraced within either the letter or spirit of the Constitution, the purpose of which was to make the extradition of fugitive criminals a matter of duty instead of mere comity between the States. The language of the Constitution and law of Congress is entirely free from ambiguity

on this point, being too obvious to admit of a judicial construction, and the authorities are uniform in the adoption of this view as to its manifest meaning."

Not voluntarily to go into a State where one is or may be charged with crime, even if the purpose be not to give the State an opportunity to arrest him and put him on trial, is not the same thing as fleeing from that State. The Constitution provides for the latter, but not for the former.

**7. A Supposed Case.** — Let us suppose that a party, who has secretly committed the crime of murder in New York State, is demanded and delivered up to the Governor of Ohio on the charge of larceny committed in Ohio before the murder in New York. In Ohio he is tried for the larceny and acquitted, and there remains and takes up his residence. Soon thereafter the fact of his murder in New York is discovered; and, in order to get possession of him, the Governor of New York demands his delivery, on the basis of an indictment for murder. The question presented by these supposed facts is whether this party, under the Constitution and the law of Congress, could be extradited from Ohio to New York to be tried for murder.

The answer to this question is in the negative; and the reason lies in the fact that the party has not fled from the State of New York. He was, under a legal process, seized and forcibly carried into the State of Ohio, to be there tried on the charge of larceny; and being acquitted, he chooses, as he has a right to do, to remain there. He is not bound to return to New York and then flee therefrom to Ohio, in order to bring himself within the provision of the Constitution; and not doing so, he is plainly not within the provision, and hence the Constitution would give no authority for his extradition.

The only possible mode of avoiding this conclusion would be to assume that the forcible removal of the man, under a legal process, from New York to Ohio and his choosing to remain in the latter State constitute a fleeing from the former State; and this assumption is a gross absurdity, quite as bad as the theory of fugitives by construction. The matter of fact is that the party did not flee from New York to Ohio. His removal from the

former to the latter State was by coercion of law, and not by his own act; and hence the case lacks the fundamental condition of a flight from justice.

What then shall be done in such a case? The proper answer is, nothing by any extradition process until there is some authority of law for it. The Governor of a State is not to become an official kidnapper, in order that the guilty may be punished. The Constitution may be amended, and then the law may be amended, so as to cover such cases; or State laws may be enacted to furnish a remedy which is not now supplied by either. Either method is possible; and were such cases matters of frequent occurrence, this would be good reason for some provision to meet them.

## CHAPTER VII.

## THE EXECUTIVE DEMAND.

**1. Provision for a Demand.** — The Constitution provides that the delivery of the accused party shall be made “on demand of the executive authority of the State from which he fled.” The law of Congress declares that “whenever the executive authority of any State or Territory demands any person as a fugitive from justice, of the executive authority of any State or Territory to which such person has fled,” then, the other prescribed requisites being supplied, the delivery shall be made.

“Demand” is the word used in both the Constitution and the law; and this implies a corresponding obligation of compliance therewith, when the conditions of such compliance are supplied. (*Kentucky v. Dennison*, 24 How. 66, 103.)

The right to make the demand is confined exclusively to the executive authority of the State or Territory from which the accused party fled. No other officer of the State or Territory is authorized to make the demand; and no officer of any other State has this authority.

**2. Conditions Precedent.** — The exercise of the right to make a demand is qualified by the conditions which are precedent to the obligation of delivery. These conditions are the following:

(1.) The person demanded must, by an indictment found or an affidavit made before a competent magistrate in the State or Territory, be charged with treason, felony, or other crime.

(2.) A certified copy of such indictment or affidavit, the certification being by the demanding executive, must accompany the demand.

(3.) The party must be demanded as a fugitive from justice.

(4.) There must be legal evidence to show that this party has fled from the State or Territory in which he is charged with crime and at least some presumption that he has fled to and is in the State or Territory to whose executive the demand is addressed.

These conditions are precedent to the obligation of making a delivery, and hence the right of making the demand must be exercised in conformity therewith. If it is not so exercised it has no legal force and creates no obligation.

The charge of crime, which is the first of the above conditions, as contemplated in the Constitution and the law, is not an executive act at all. It is made by the indictment of a grand jury, or by affidavit before a magistrate, and all that the demanding executive has to do with it is to certify that the copy thereof, which is to accompany the demand, is authentic. He has no right to make a demand until a charge has been made in the manner prescribed by the law of Congress.

**3. Discretion of the Demanding Executive.** — Whether the executive of a State or Territory shall actually make a demand upon the executive authority of another State or Territory, for the delivery of a fugitive criminal, is a question which both the Constitution and the law of Congress leave entirely to his discretion. Neither imposes it upon him as a duty in any case. What they do is to secure the right and specify certain conditions in respect to the manner in which it shall be exercised, and then leave every executive to determine for himself whether the right shall be exercised or not.

This discretion, thus left with the executive, may be regulated by State laws, provided that they are not inconsistent with the Constitution and laws of the United States. The latter do not operate upon the question at all until that stage is reached at which a demand is made, and hence State laws regulating the discretion of the executive prior to the demand, and defining the circumstances in which he may make such demand in conformity with the provisions of the Constitution and the law of Congress, are exposed to no constitutional objection. They simply regulate a discretion which he would otherwise exercise upon his own judgment. They make rules for him where he would otherwise make rules for himself. Some of the States have thus legislated, and all might do so if they chose. (*Ex parte Oubreth*, 49 Cal. 436.)

**4. The General Rule** — The general rule that ought to govern the executive authority of every State and Territory is never

to make a demand upon the executive authority of any other State or Territory which ought not, according to the letter and intent of the Constitution and the law, to be complied with.

The violation of this rule is proof of ignorance or carelessness, or of some sinister and improper design on the part of the demanding executive. It may prove either and one or the other it always proves.

The law specifies the case in which the duty of delivery shall be an imperative obligation, and in which a citizen or inhabitant of a State or Territory, otherwise entitled to be unmolested, shall be arrested and delivered up, to be removed to another jurisdiction; and every executive, before making a demand, should scrupulously see to it that this case exists in fact. He should confine himself to the exact case stated, and to the exact purpose intended.

Judge Cooley very justly remarks that the "abuse of the process by issuing it in cases where the purpose is the enforcement of a private demand rather than the punishment of crime," is one source of the practical difficulties which have arisen in the execution of the law. He adds that this abuse "should be corrected by greater care in the executive to whom application for a requisition is made, in satisfying himself that it is made in the interest of public justice." (Princeton Review, January, 1879, p. 176.) A requisition made in any other interest, or for any other end, is simply a fraud, however regular it may be in the matter of form.

**5. Subsidiary Rules.**—The following subsidiary rules will serve as useful guides against any misapprehension or mistake on this subject:

(1.) The application for a requisition, to be made upon the executive of another State or Territory, should always proceed from some official authority; and inasmuch as the crime charged must have been committed, if committed at all, in some county of the State or Territory, the District Attorney of that county, having assigned to him by law the duty of prosecuting crime and bringing offenders to justice, is the proper person to make the application. He is on the ground, and may be assumed to be acquainted with the facts, and to be the most competent judge, in the first instance, whether a requisition should be made or not.

(2.) The executive should have before him, in either the form



of an indictment or an affidavit or affidavits, duly certified, an exhibit of the facts and circumstances constituting the crime alleged. He is to judge on an important question of fact, and the evidence submitted to him should show a crime by the necessary specific allegations. Upon that evidence he should exercise a careful judgment as to its character, its legality, the facts set forth by it, and all circumstances which may in any way affect the conclusion to be drawn therefrom.

(3.) The executive should be satisfied by sufficient evidence that the criminal, on the supposition that a crime has been legally charged, has actually fled from the State or Territory, and hence is not, without extradition, within the reach of its justice. This is a question of fact; and until the fact of flight is proved by proper evidence, there is no authority for making a demand at all.

(4.) The executive should require adequate evidence as to the State or Territory in which the criminal has taken refuge. He must address his demand to some specific executive, and hence he needs to be duly informed on this point.

(5.) The executive, where circumstances lead to the suspicion that the requisition is sought by interested parties, or for other purposes than those of public justice in the punishment of the criminal, should decline to make the demand until the grounds of suspicion are removed. No executive is worthy of the office he fills, or faithful to the Constitution and the law, if he allows himself to be consciously a party to any abuse or misuse of the extradition process. If on this point he has been deceived, and discovers the fact after making the demand, he should instantly revoke it. The extradition remedy is summary in its action; and though highly useful for its proper purposes, it is, nevertheless, oppressive when perverted or mis-applied.

(6.) The legal papers requisite to constitute a valid demand should be in due form of law. These papers are to be presented to the executive authority of another State or Territory, and by that authority carefully examined, as they should be, in respect to their contents and form; and if they are not such as the law prescribes, they do not upon their face furnish any ground for making a delivery of the person claimed.

The records of courts, in dealing with such cases upon *habeas corpus* to test the legality of the proceedings, show not a little ignorance or carelessness among Governors, in both demanding and surrendering fugitive criminals. The cases are not infrequent in which the fugitive, after being arrested by the executive warrant, has been discharged, by writ of *habeas corpus*, on the ground that the papers in the case did not conform to law. The executive to whom the demand was addressed ought to have seen this defect, and for that reason to have declined to order the arrest of the party claimed.

The simple purpose to give effect to the language and intent of the Constitution and the law, supplemented by the application of these rules in each case, when no rules are furnished by legislation, will ordinarily guard the executive authority against any mistakes in making demands for the surrender of fugitive criminals. Thus exercising his discretion in making these demands, the executive will maintain the dignity of his office, serve the interests of public justice, and at the same time avoid using his power for the accomplishment of other ends than the one intended by the Constitution.

**6. Application for Requisitions.** — The executive authority in some of the States has adopted a series of specific regulations which must be followed in making application for the issue of requisitions to the executive authority of other States or Territories. The design is to guard against any abuse of the process. The following examples illustrate the nature and scope of these regulations :

(I.) THE STATE OF NEW YORK.

STATE OF NEW YORK, }  
EXECUTIVE DEPARTMENT. }

The following regulations are adopted by the Governor in reference to applications for requisitions and mandates upon requisitions:

Applications must come from District Attorneys, and be by duplicate original papers, except the indictment, which may be a certified copy.

1st. The District Attorney must certify that in his opinion the ends of public justice require that the criminal be brought back

to the State for trial, at the public expense; that he is content that such expense be a county charge, and that he believes he has within his reach, and will be able to produce on the trial, the evidence necessary to secure conviction.

2d. He must further name the State upon whose executive the requisition is to be made, and name a proper person as agent, having no private interest in the arrest of the fugitive.

3d. If there has been any former requisition for the same person growing out of the same transactions, it must be so stated, with an explanation of the reasons for asking for a new requisition.

4th. If the criminal is known to be under arrest for any other offense, it must be so stated.

If an indictment has been found, a certified copy of the same must accompany the application.

Also there must be by affidavit positive proof that the criminal has fled from the State and the justice thereof, or proof of facts and circumstances warranting such conclusion, with a satisfactory explanation of delay in prosecution, or other matter calculated to excite suspicion of want of good faith in the proceeding. Also proof that the criminal has taken refuge in the State on whose Executive the demand is to be made.

If known, it must appear whether the criminal is a resident of this State, or only transiently here.

Matters stated on information and belief must be stated with the source of information and belief, and mere general allegations of law and fact be avoided as far as possible.

In cases in which no indictment has been found, there must be, in addition to the proofs above mentioned, proof by affidavit, taken before a magistrate, of the facts and circumstances constituting the crime.

If the crime charged be forgery, the affidavit of the person whose name is alleged to be forged must be produced, or a satisfactory reason given for its absence.

In all cases the official character of the officer taking the affidavits must be duly certified.

District Attorneys will be held to the strictest responsibility to see that this process is not used for the purpose of collecting debts, or for other private purposes, especially in false pretense, embezzlement and forgery cases.

If it is discovered that this process is being abused, or has been inadvertently granted, there will be no hesitation in revoking it.

Requisitions will be mailed directly to the Governors upon whom made, unless there be very special reason for doing otherwise. The agent's authority will be sent to the District Attorney for delivery, who must see to it that the agent makes return of it,

within a reasonable time, to the Executive Department, with a statement of the manner in which his duty has been discharged.

Mandates upon requisitions from other States will not be issued unless the requisition is supported by proofs conforming substantially, in material matters, as to the statements about the crime, and the manner of the criminal's departure from the State, and the good faith of the prosecution, to the requirements of the foregoing regulations in similar cases.

Mandates will be mailed directly to the Sheriff of the county where the criminal is supposed to be. He will be directed in all cases to allow the man arrested a reasonable opportunity to assert, before delivery, any legal rights he may have in the premises.

(II.) THE STATE OF PENNSYLVANIA.

EXECUTIVE DEPARTMENT, }  
HARRISBURG, PA., . }

SIR: I am directed by his Excellency the Governor to ask your attention to the requirements embraced in the following regulations governing the issue of requisitions:

1. An application from the District Attorney in all cases except those in which the proceedings are instituted by the Attorney-General of the State, or the criminal has escaped from county jail or State Penitentiary. The application must be accompanied with the office fee, \$1.00.

2. A duly attested copy of the indictment, if an indictment has been found.

3. If an indictment has not been found, the application must be accompanied with duly attested copies of the information, warrant and proceedings before the court, alderman or justice, and affidavit or affidavits setting forth the material facts constituting the offense charged, which must be sufficient to establish a *prima facie* case, such as would justify a grand jury in finding an indictment, and that the application for the requisition is made in good faith, not for any private ends, but with a view to prosecute to conviction the charge against the criminal. [This regulation will be applied with especial strictness in all cases where the charge is cheating, obtaining money by false pretenses (the false and deceitful representations must be set forth), embezzlement and the like.]

4. In all cases an affidavit is required, setting forth that the criminal was in the State at the time of the offense; that he is a fugitive from justice, having fled the State since the commission of the offense, and that he is in the State or Territory on whose Governor a requisition is asked. Any delay in the prosecution of the offense must be satisfactorily explained. The facts must be stated specifically, and if on information and belief, then the

grounds of the same. The official character of the officers before whom the affidavits are made must be certified to by the prothonotary of the county.

5. Duplicates of all papers furnished to the Governor will be required in order that one may be retained here and the other attached to the requisition.

6. The District Attorney must name the agent, who must be either the Sheriff of the proper county, his deputies, or some one having no private interest in the arrest of the fugitive.

Requisitions are mailed to the Governors, unless there is some especial reason for sending them otherwise. The authority to the agent is delivered to him personally, or mailed to the District Attorney; and the agent must make return to this Department of his proceedings. Mandates, unless there is some especial reason for doing otherwise, are mailed to the Sheriff of the county, with directions to give the persons arrested opportunity to assert their legal rights before being delivered up.

Requisitions will not issue in cases of fornication and bastardy, or in any case to aid in collecting a debt or enforcing a civil remedy, or in cases in which the offense is of such trivial character as to leave a doubt of the granting of a mandate thereon by the Executive of other States and Territories.

*Secretary of the Commonwealth.*

*To His Excellency, the Governor of the Commonwealth of Pennsylvania:*

SIR: I have the honor to submit this application for a requisition on the Governor of the      of      for      , a fugitive from justice,      ; and I certify,

1st. That I approve of the application.

2d. The party,      , is a fugitive from justice, and I believe he is at this time in the      of      , and that he fled from the State of Pennsylvania before an arrest could be made.

3d. The ends of justice, in my deliberate judgment, require that he should be brought back to this State for trial.

4th. I name      , as a proper person to whom the warrant as agent shall issue, and I certify that he has no private interest in the arrest of the fugitive.

5th. I am satisfied that the expenses be charged upon this county, and shall take the proper means to obtain them.

*District Attorney.*

## (III.) THE STATE OF MASSACHUSETTS.

COMMONWEALTH OF MASSACHUSETTS, }  
 EXECUTIVE DEPARTMENT, }  
 BOSTON, }

SIR: I am directed by His Excellency the Governor to ask your attention to the requirements embraced in the following regulations:

Every application to the Governor for a requisition upon the Executive authority of any other State or Territory, for the delivery up and return of any offender who has fled from the justice of this State, must be in writing, and must be accompanied by the following documents and proofs:

1. A duly attested copy of the indictment, if an indictment has been found against the offender.

2. If no indictment has been found, then the application must be accompanied by a duly attested copy of the complaint, made before a court or magistrate authorized to receive the same. And if a copy of a complaint is presented, such copy must be accompanied by affidavits to the facts constituting the offense charged.

3. There must in every case be sworn evidence that the person charged is a fugitive from justice; that is, that he has fled from the State to avoid arrest.

The copy of the indictment or complaint should be attested by the clerk or a justice of the court, or by the magistrate.

If no indictment has been found, and a copy of a complaint is presented, the affidavits in support thereof must be sufficient to establish a *prima facie* case — such as would justify a grand jury in finding an indictment.

The affidavits to show that the person charged is a fugitive from justice should show, as particularly as may be, the time and circumstances of his flight, and in what State or Territory he now is.

If the offense was not of recent occurrence, sufficient reasons must be given why the application has been delayed.

The Governor, in his discretion, will require evidence of the character of the persons making the affidavits.

The purpose, in granting requisitions, is to aid in the administration of the criminal law. No requisition will be issued in any case to aid in collecting a debt or enforcing a civil remedy against a person who has left the State. In all cases where indictments have not been found, and where the conduct of the prosecution is not in the hands of the law officers of the State, it must be made to appear that the application for a requisition is made in good faith, not for any private ends, but with a view to enforce the charge of crime against the offender. This rule will be applied

with especial strictness in all cases of cheating, obtaining money by false pretenses, embezzlement, and the like.

The Governor has no power to require the surrender of fugitives who have taken refuge in the British Provinces.

Duplicates of all papers furnished to the Governor will be required, in order that one set may be retained here, and the other attached to the requisition.

By General Statutes, chapter 177, section 1, the Governor of this State is only authorized to deliver over to the Executive of any other State or Territory persons charged therein with crime, when the demand is accompanied by the same documents and proofs which are mentioned above, in paragraphs 1, 2 and 3.

Respectfully,

*Private Secretary.*

#### (IV.) THE STATE OF OHIO.

1. Applications must be made by the prosecuting attorney, except in cases of convicts escaped from the penitentiary.

2. The statutes of Ohio provide for requisitions in cases of felony only; but the Governor may issue extradition warrants without regard to our classification of offenses.

3. Applications and accompanying papers must be in duplicate.

4. The prosecuting attorney must designate a person to be appointed agent. As a rule, the Sheriff should be designated; and whoever the person may be, he should be instructed not to permit a compromise of the case under any circumstances.

5. The employment of the extradition process as a means of collecting debts, in cases of real or assumed false pretense, is so general that a proper use of it is a rare exception. Creditors invoke the process with no other purpose in view. This abuse has been carried to such an extent that the Governors of the several States feel the necessity of putting an end to it; and even the refusal to either demand or surrender fugitives so charged has been suggested as the only sure remedy. Prosecuting attorneys will, therefore, notify persons who request them to make application in cases of this kind, that the Governor will not issue a requisition unless convinced that the sole intention is to prosecute the alleged fugitives for the offense charged.

6. Every application must be accompanied by the affidavit required by statute, as to the purpose for which the extradition of the fugitive is desired. This is printed on the same sheet with the blank application furnished. It should be made by the prosecuting attorney, because the prosecution is under his control; and before the clerk of court, to facilitate authentication by the Governor, as he can make one certificate cover the whole case. (See form of certificate on same sheet with application.)

7. If the offense charged is not of recent occurrence, a satisfactory reason must be given for the delay in making the application. (See paragraph 16.)

8. Requisitions will be issued only upon the condition that no portion of the expense pertaining to the extradition shall be paid by the State.

9. Requisitions will be recalled, and warrants revoked, when it is discovered that fraud or deception has been practiced.

*In Case of Indictment.*

10. When the application is based upon an indictment, the only papers required are the application, copy of indictment duly authenticated, and the affidavit mentioned in the sixth paragraph—all in duplicate.

*In Case of Complaint.*

11. When based upon a complaint, duplicate copies of the instrument, certified and authenticated as specified in paragraphs 15 and 18, and affidavits (in duplicate) specified in paragraphs 6 and 14, must accompany the application.

12. Although Mayors and Police Judges are magistrates, under the statutes of Ohio, complaints upon which requisitions are to be made should be made before *Justices of the Peace only*, because (1) Justices are recognized everywhere, *without question*, as magistrates, and because (2) this is essential to a due authentication—neither the Governor nor clerks of Courts of Common Pleas having official knowledge of the election and qualification of Mayors and Police Judges.

13. In one or two counties, the practice of making affidavits before Notaries Public, and filing them with Justices of the Peace as complaints, prevails. This is certainly not based upon a correct interpretation of the statutes of Ohio; and besides, the statutes of the United States, which govern in the matter of extradition, provide that complaints *shall be made before a magistrate*.

14. The statute requires, in case of complaint, "an affidavit or affidavits, to the facts constituting the offense charged, by persons having actual knowledge thereof." The meaning of this is, that an affidavit or affidavits giving in detail all known facts and circumstances having a bearing upon a case, shall be furnished, in support of and to strengthen the complaint, which, generally and properly, is simply a brief statement, charging the offense, and by whom, when, where, and by what means it was committed. If no person other than the complainant possesses the necessary information, there can, of course, be but one such affidavit. These affidavits to be *originals*, and *in duplicate*.

15. The copies of the complaint which accompany the applica-



tion must be certified by the justice of the peace before whom the complaint was made, to be true copies of the original instrument on file in his office. Sometimes the original complaint is taken in triplicate, and two of them transmitted with the application, under the mistaken notion that they are better than copies; but the statute requires *certified copies*.

16. An application based upon a complaint, when there has been a session of the Grand Jury after the commission of the offense, and an opportunity afforded thereby to procure an indictment, will be regarded with disfavor, and a satisfactory explanation of the failure to procure an indictment will be required.

#### *Authentication.*

17. In case of indictment, the clerk of court must make duplicate copies of the instrument, and certify, under his official seal, that each is a true copy of the original indictment on file in his office.

18. In case of complaint, the clerk of court must attach to each copy of the instrument, following the certificate of the justice of the peace, the usual certificate as to the election, qualification, etc., of that officer. This must not be omitted upon the theory that such certificate can be made by the Governor or Secretary of State, as the statute (Vol. 80, O. L., p. 186) provides that "no officer other than the clerk of Court of Common Pleas shall certify to the signature and qualification of justices of the peace."

19. The certificates referred to in the last two paragraphs should, invariably, be signed by the clerk himself, as the papers must receive a final authentication by the Governor, who has no official knowledge of the appointment of deputies. Although the clerk's seal imports verity, and is, therefore, for general purposes, a sufficient verification, when used by a deputy, the Governor, in a case where a deputy signs the name of the clerk, can certify only as to the statutory authority of deputies, and that the principal is clerk; but in such case, or where a deputy makes the certificate himself, he cannot certify that such person is deputy clerk. *Extradition papers undergo the scrutiny of able lawyers, especially when the surrender of a fugitive is resisted; and opportunity must not be afforded them to defeat or delay justice and cause unnecessary expense, upon a claim of insufficiency in any respect.*

#### *Arrest and Commitment in the Absence of an Extradition Warrant.*

20. Fugitive criminals from other States sometimes avoid arrest after they are discovered or secure their release, after ar-

### References.

The foregoing instructions should be studied carefully, filed for reference, and followed strictly in order that mistakes, delays and unnecessary expense may be avoided. *A failure to follow them will necessitate the return of the papers.*

*Hon.* \_\_\_\_\_, Governor of the State of Ohio:

I designate \_\_\_\_\_ as a proper person to be appointed agent of the State, and certify that he has no personal interest in the arrest and return of said fugitive other than proper compensation for his services.

Very respectfully,  
 \_\_\_\_\_, *Prosecuting Attorney,*  
*County, Ohio.*

\* The last clause to be erased in case of indictment.

THE STATE OF OHIO, }  
County, } ss.

I, \_\_\_\_\_, having been duly sworn, depose and say that I am the prosecuting attorney of said county; that the person charged by \_\_\_\_\_ (a duly authenticated copy of which is attached hereto) with the crime of \_\_\_\_\_, fugitive from justice; and that the foregoing application to the Governor of Ohio for a requisition for \_\_\_\_\_ extradition is made in good faith, with the sole intent to prosecute \_\_\_\_\_ for said offense, and not to secure \_\_\_\_\_ return to said county to afford opportunity to serve with civil process, nor for any other private purpose.

Sworn to before me, and subscribed in my }  
presence the \_\_\_\_\_ day of \_\_\_\_\_, 188 . }

[L. s.]

*Clerk of the Court of Common Pleas,  
County, Ohio.*

THE STATE OF OHIO, }  
Office of the Governor. }

I, \_\_\_\_\_, Governor of the State of Ohio, do hereby certify that \_\_\_\_\_, whose signature and official seal are affixed to the certificate of authentication hereto attached, and also to the foregoing jurat, was, at the date thereof, Clerk of the Court of Common Pleas of \_\_\_\_\_ county, State of Ohio, duly \_\_\_\_\_, commissioned and qualified; that his official acts are entitled to full faith and credit; and that he is the proper officer to make said certificates, which are in due form.

In testimony whereof, I have hereunto subscribed my name, and caused the Great Seal of the State of Ohio to be affixed, at the city of Columbus, the \_\_\_\_\_ day of \_\_\_\_\_, in the year of our Lord one thousand eight hundred and eighty \_\_\_\_\_, and in the one hundred and \_\_\_\_\_ year of the Independence of the United States of America.

By the Governor:

*Secretary of State.*

This exhibit presents the rules which the Governors of these States, respectively, have adopted in respect to applications made to them for demands upon the Governors of other States or Territories, for the arrest and delivery of fugitive criminals. It is incidentally stated in two of the exhibits that substantially the same rules will be applied when demands are addressed to these Governors by the Governors of other States or Territories.

The object sought by the adoption of such regulations is to confine extradition to the purpose set forth in the Constitution and the law of Congress, and thereby guard against any abuse of the remedy. Extradition for any purpose other than the one named, is always a gross abuse; and the Governors of States and Territories should scrupulously limit the remedy to the single end intended.

**7. The Executive Requisition.**—Neither the Constitution nor the law prescribes any particular form of the requisition to be issued. Both speak of it as a “demand.” Both leave the phraseology thereof to the discretion of the executive authority; and yet both imply that the demand, in its recitals and its accompanying papers, must set forth the facts specified in the Constitution and the law. The following are examples of the form of requisitions:

(I.) THE STATE OF NEW YORK.

STATE OF NEW YORK, }  
EXECUTIVE CHAMBER. }

Governor of the State of New York.

*To His Excellency, Governor of the State of* :

Whereas, it appears by , duly authenticated, in accordance with the laws of this State, that stand charged with the crime of , committed in the county of , in said State; and it has been represented to me that he has fled from justice of this State, and may have taken refuge in the State of ;

Now, therefore, pursuant to the provisions of the Constitution and laws of the United States in such case made and provided, I do hereby require that the said be apprehended and delivered to , who is hereby authorized to receive and convey to the State of New York, there to be dealt with according to law.

In witness whereof, I have hereunto signed my name and affixed the privy seal of the State, at the City of Albany, this day of , in the year of our Lord one thousand eight hundred and seventy .

By the Governor.

*Private Secretary.*

STATE OF NEW YORK, }  
EXECUTIVE CHAMBER. }

Governor of the State of New York.

*To all to whom these presents shall come :*

Know ye, that I have authorized and empowered and by these presents do authorize and empower to take and receive from the proper authorities of the State of , fugitive from justice, and convey at the exclusive cost of the county of , to the State of New York, there to be dealt with according to law.

In witness whereof, I have hereunto signed my name and affixed the privy seal of the State, at the City of Albany, this day of , in the year of our Lord one thousand eight hundred and .

By the Governor.

*Private Secretary.*

## (II.) THE STATE OF PENNSYLVANIA.

COMMONWEALTH OF PENNSYLVANIA, }  
EXECUTIVE DEPARTMENT. }

John F. Hartranft, Governor of Pennsylvania.

*To His Excellency, the Governor of the State of :*

Whereas, it appears by the annexed which authentic and duly authenticated in accordance with the laws of this State, that stand charged with the crime of , committed in the county of , in this State, and it has been represented to me that ha fled from the justice of this State and ha taken refuge in the State of ;

Now, therefore, pursuant to the provisions of the Constitution and laws of the United States, in such case made and provided, I do hereby request that the said be apprehended and delivered to , who is hereby authorized to receive and convey to the State of Pennsylvania, there to be dealt with according to law.

In witness whereof, I have hereunto set my hand and caused the great seal of the State to be affixed, at Harrisburg, this day of in the year of our Lord one thousand eight hundred and .

By the Governor.

*Governor of Pennsylvania.*

*Secretary of the Commonwealth.*

(III.) THE STATE OF MASSACHUSETTS.

THE COMMONWEALTH OF MASSACHUSETTS, }

*To His Excellency the Governor of :*

The undersigned, Governor of the Commonwealth of Massachusetts, would inform your Excellency that charged with the crime of (as will more fully appear by the papers hereunto annexed, which I certify to be authentic), fugitive from the justice of this Commonwealth, and is now supposed to be within the limits of the State of ;

Your Excellency is therefore requested, in conformity to the Constitution and a law of the United States, to cause the said to be delivered to , who appointed agent to receive , that he may be brought into this Commonwealth, and dealt with as to law and justice may appertain.

In witness whereof, I have caused the seal of this Commonwealth to be hereunto affixed, this day of , in the year of our Lord one thousand eight hundred and , and of the Independence of the United States of America, the one hundred and

By His Excellency the Governor.

*Secretary of the Commonwealth.*

## COMMONWEALTH OF MASSACHUSETTS, }

By His Excellency the Governor of the Commonwealth.

*To , in said Commonwealth, greeting :*

Whereas, application has been made by me to the supreme Executive authority of the State of for the delivery of , charged with the crime of , a fugitive from the justice of this Commonwealth, and supposed to be within the limits of the State of ;

I do hereby, by virtue of the authority in me vested, appoint you the said agent, to receive the said from the Executive of said State of , and to bring within this Commonwealth, that may be dealt with as to law and justice may appertain.

In testimony whereof, I have caused the seal of the Commonwealth to be hereunto affixed, this day of , in the year of our Lord one thousand eight hundred and , and of the Independence of the United States of America the one hundred and

By His Excellency the Governor.

*Secretary of the Commonwealth.*

## (IV.) THE STATE OF OHIO.

*To His Excellency the Governor of :*

WHEREAS, it appears by the annexed papers, which are duly authenticated in accordance with the laws of this State, that stand charged by with the crime of committed in the county of , in this State, and it has been represented to me that he has fled from the justice of this State, and taken refuge within the of .

Now, therefore, pursuant to the provisions of the Constitution and laws of the United States, in such case made and provided, I do hereby make requisition for the apprehension of said fugitive, and for delivery to the agent of this State, duly appointed and commissioned to receive and convey to the county aforesaid, there to be dealt with in accordance with law.

In testimony whereof, I have hereunto subscribed my name and caused the great seal of the State of Ohio to be affixed,

at Columbus, the       day of       , in the year of our Lord one thousand eight hundred and eighty       , and in the one hundred and       year of the Independence of the United States of America.

By the Governor.

*Secretary of State.*

These exhibits are specimens of the form of making a requisition adopted by the executives of the above-named States respectively, together with the form of the commission given to the receiving agent, who is thereby authorized to take the fugitive into his custody, and is also empowered by the law of Congress to transport him to the demanding State or Territory.

**8. The Accompanying Papers.** — The demand or requisition, though indispensable, if unaccompanied by the proper papers, has no legal force whatever. The Governor to whom it is addressed has the right to know on what basis, and for what reasons the demand is made, and for this purpose it is not enough that the demanding Governor has made a statement of facts, unless that statement is accompanied with documentary evidence showing it to be true. The statement itself proves nothing. (*Ex parte Thornton*, 9 Texas, 635.)

The law of Congress provides for the delivery of the alleged fugitive when the executive, making the demand, "produces a copy of an indictment found, or an affidavit made before a magistrate of any State or Territory, charging the person demanded with treason, felony, or other crime, certified as authentic by the Governor or Chief Magistrate of the State or Territory from whence the person so charged has fled."

This certified copy of the charge of crime, in one of the forms mentioned, is entirely distinct from the requisition of the demanding Governor, and must always be produced in connection with it. It may or may not be physically annexed to it. It is sufficient if it is produced and referred to as the ground of the requisition and the proof of the general allegations therein contained. (*Kingsbury's Case*, 106 Mass. 223.) The requisition need not set out the contents of the copy in all its details, but it must con-



nect itself with it in the relation of evidence to show what the requisition affirms in general terms.

The indictment or affidavit which makes the charge of crime must be authenticated to the demanding executive, as regularly found in the one case, or made before a competent magistrate in the other; and when he certifies to the authenticity of the copy of the one or the other, he in legal effect certifies to the authenticity of the indictment or affidavit. His certificate conclusively establishes the legal character of the paper for the purpose in question, and makes it the duty of the Governor to whom the requisition is addressed to regard the paper in this light.

There can be no constitutional demand for the extradition of an accused party, unless he has "fled" from the demanding State or Territory; and hence the requisition for his delivery must not only declare this fact, but must be accompanied by legal evidence to prove it. This evidence, if not contained in the charge of crime, must be supplied by a duly authenticated affidavit or affidavits showing the fact. (*Jackson's Case*, 2 Flip. 183.) The mere declaration of such a fact in the requisition, if unsupported by such evidence, is not sufficient. (*Ex parte Smith*, 3 McLean, 121.)

It should be borne in mind also that the legislatures of some of the States have prescribed rules which the Governors thereof are required to observe, not only in issuing requisitions, but also in acting upon requisitions addressed to them from the Governors of other States or Territories. And, where such rules are established as a part of the system of the local law of a State or States, it will be prudent, without reference to the question of their consistency with the law of Congress, to conform to them when addressing requisitions to the Governors of such States. The probability is that these Governors will feel themselves constrained to follow the local law, and decline to deliver up a fugitive criminal unless this law has been complied with.

Massachusetts, for example, requires that the demand upon the Governor of that State, for the delivery of a fugitive criminal, shall be "accompanied by sworn evidence that the party charged is a fugitive from justice," and that, when the charge of crime is in the form of a complaint, the complaint shall be "accompanied by affidavits to the facts constituting the offense charged, by

persons having actual knowledge thereof." These are regulations to be observed by the Governor of that State, whether in demanding or delivering up fugitive criminals; and, in order to make a demand upon him successful, it is necessary that the demanding executive should comply with these regulations. (Gen. Stat. of Mass., chap. 177, § 1.)

So, also, section 95 of the Revised Statutes of Ohio provides, in addition to such regulations, that a demand upon the Governor of that State shall be accompanied by sworn evidence that the demand "is made in good faith for the punishment of crime, and not for the purpose of collecting a debt or pecuniary mulct, or of removing the alleged fugitive to a foreign jurisdiction with a view there to serve him with civil process." If the Governor of Ohio follows this rule, as he doubtless will, then the evidence, as here provided for, must be presented to him, in order to secure the delivery of a fugitive criminal. It was intended by the legislature to operate as a rule to govern his action. Indeed, the Governors of that State had adopted the rule before it was enacted as formal law.

Whatever policy, whether by executive or legislative authority, may be adopted by the respective States in delivering fugitive criminals to other States or Territories, should become a rule of practice in demanding them. There is no power to compel any State to make such a delivery. Each State, subject to the authority of the Constitution and the law of Congress, exercises its own judgment as to what is required by that Constitution and that law, and as to what rules and regulations shall be observed by the Governor thereof, whether in demanding or delivering up fugitive criminals. From this judgment there is no appeal. It is hence necessary for the demanding State, in making the demand, to conform its practice to the rules established by the State asked to make the delivery.

## CHAPTER VIII.

## EXECUTIVE DELIVERY.

It is not always true that requisitions for the delivery of fugitive criminals are complied with, and is doubtless sometimes true that they should not be. Non-compliance, either for good and sufficient reason or without it, supposes a difference of judgment between the executive demanding the accused party and the executive asked to deliver him up; and out of this difference sharp conflicts and controversies have sometimes arisen between Governors of States, with no tribunal established by law to settle the matter in dispute.

The point at issue in such cases relates either to the facts or to the construction of the Constitution and the law in application to the facts, or to both taken together. The demanding executive takes one view, and the executive to whom the demand is addressed does not deem it correct; and neither is able to satisfy the other. Neither has any power to control the action of the other. The demanding executive has already acted in making the demand, and what the executive on whom the demand is made shall do, is a question for him to decide.

The design of this chapter will be to consider the various questions that stand connected with the executive delivery of fugitive criminals, and, so far as possible, ascertain what is truth in respect to this branch of inter-State extradition.

**1. The Constitution and the Law.**—The Constitution of the United States declares that the "person" whom it describes—namely, "a person charged in any State with treason, felony, or other crime, who shall flee from justice and be found in another State," and who shall be demanded by the "executive authority of the State from which he fled"—"*shall \* \* \* be delivered up*, to be removed to the State having jurisdiction of the crime."

This language, though not specifying the agency by which the delivery shall be effected, is *imperative* as to the obligation when the conditions named exist in a particular case, and is also a part

of "the supreme law of the land," and, hence, of every State. The charge, the flight, and the demand are the three conditions named: and when they exist there can be no discretion as to whether the delivery shall be made or not. It *must* be made, or the Constitution will be violated. All the conditions must exist, not simply one or two of them; and if they do exist, obedience is imperative. Such has been the uniform doctrine of the courts whenever they have had occasion to express an opinion on the subject.

In *Botts v. Williams*, 17 B. Monr. (Ky.) 687, it was held that a fugitive criminal "can only be delivered up upon the formal requisition of the Governor of the State, in compliance with the constitutional provision." No other person can make the requisition; and when he makes it in accordance with the Constitution, then it must be complied with.

The law of Congress enacted in 1793 (1 U. S. Stat. at Large, 302), and reproduced as section 5278 of the Revised Statutes of the United States, after specifying the authority upon which the demand shall be made and the manner in which the charge of crime shall be made and authenticated, and thus providing for the execution of the constitutional provision, proceeds to say: "*It shall be the duty* of the executive authority of the State or Territory to which such person has fled, to cause him to be arrested and secured, and to cause notice of the arrest to be given to the executive authority making such demand, or to the agent of such authority appointed to receive the fugitive, and to cause the fugitive to be delivered to such agent when he shall appear," with the provision that "if no such agent appears within six months from the time of the arrest the prisoner may be discharged," and with the further provision that "all costs or expenses incurred in the apprehending, securing, and transporting such fugitive to the State or Territory making such demand shall be paid by such State or Territory."

The question whether this law is constitutional was considered by the Supreme Court of the United States, in *Prigg v. The Commonwealth of Pennsylvania*, 16 Pet. 539, and its constitutionality affirmed, so far as the giving of the authority specified to the Governors of States and Territories is concerned. There is no question in debate as to the validity of the law for this purpose.

**2. The Special Power Conferred.**— The Governors of States and Territories in this country possess no general power of issuing warrants for the arrest of persons on the basis of criminal charges. This judicial function belongs to judicial magistrates, and, in all ordinary cases, is exclusively performed by them.

The law of Congress, however, in the cases described, and for the purpose designated, attaches this function to the gubernatorial office. It authorizes the Governors of States and Territories to cause the accused party to be seized and secured, which is to be done by the issue of a warrant for his arrest. Moreover, in the case of State Governors, this authority is given to a State officer not elected or appointed under any authority which Congress is competent to exercise.

This special power is conferred, not in direct terms, but by imposing a duty, the performance of which implies the power. The law of Congress says that "it shall be the duty of the executive authority of the State or Territory to which such person has fled," in the circumstances specified, "to cause him to be seized and secured," and delivered up to the demanding State or Territory. This cannot be done without a warrant of arrest addressed to some subordinate State or Territorial officer, who is to execute the warrant by making the arrest and taking the party into his custody, and holding him subject to the direction of the authority that ordered the arrest.

The Governors of States have assumed, and the courts of this country have concurred with them in the assumption, that, although they are State officers, and, in the exercise of their ordinary powers as such, are limited to State constitutions and laws as the field of their powers and duties, they are, nevertheless, authorized to exercise this special power given to them by Congress, and that, too, without any State legislation bestowing it. Congress having attached the power to the office, and made its execution, in the cases described, one of the duties thereof, State Governors have acted accordingly, and have never declined to act for want of adequate authority.

**3. The Enforcement of the Duty.**— The question then arises whether Congress, having power to prescribe this particular duty to State Governors, and, having done so, also has power to enforce its performance by any compulsory process.

The Supreme Court of the United States, as already stated, held, in *Prigg v. The Commonwealth of Pennsylvania*, 16 Pet. 539, that Congress could prescribe the duty and give the authority; and the same court, in *Kentucky v. Dennison*, 24 How. 66, when asked to issue a *mandamus* to compel the Governor of Ohio to comply with the requisition addressed to him by the Governor of Kentucky, with which the former had refused to comply, decided that it had no jurisdiction in the case. Chief Justice Taney, in delivering the opinion of the court, said:

“But looking at the subject-matter of this law, and the relation which the United States and the several States bear to each other, the court is of opinion the words ‘it shall be the duty’ were not used as mandatory and compulsory, but as declaratory of the moral duty which this compact created, when Congress had provided the mode of carrying it into execution. The act does not provide any means to compel the execution of this duty, nor inflict any punishment for neglect or refusal on the part of the executive of this State; nor is there any clause or provision in the Constitution which arms the Government of the United States with the power. \* \* \* If the Governor of Ohio refuses to discharge this duty, there is no power delegated to the General Government, either through the judicial department or any other department, to use any coercive means to compel him. And upon this ground the motion for a *mandamus* must be overruled.”

So, also, in *Taylor v. Taintor*, 16 Wall. 306, the same court said: “In such cases the Governor acts in his official capacity, and represents the sovereignty of the State in giving efficacy to the Constitution of the United States and the law of Congress. If he refuse, there is no means of compulsion. \* \* \* In the event of refusal, the State making the demand must submit. There is no alternative.”

These cases, especially the actual decision in *Kentucky v. Dennison*, settle the question that the duty of delivering up fugitive criminals, as imposed by the act of Congress upon State executives, is not capable of enforcement by any power of the General Government. The act, while giving the power to perform the duty, and, therefore, a law in this sense, is not law at all in the sense of annexing any penalty to non-performance, or in the sense of empowering any court to compel the performance of the duty. Whether a State executive shall act in the premises or not is for

him to determine, and that, too, with entire impunity to himself, so far as any compulsion by the Federal Government is concerned. This is the precise state of the case as settled by the decision in *Kentucky v. Dennison*.

Nor is the case materially altered if we turn to State laws. Some of the States have enacted laws, and some have not, to regulate the action of their executives in the premises. Where no such laws are enacted, then, of course, the matter stands just where it does under the Constitution and laws of the United States.

But where, on the other hand, there are State laws on the subject, these laws cannot be enforced against the executive authority by a *mandamus* from the State judiciary, compelling this authority to do or not to do a specific thing. The executive authority is a co-equal and co-ordinate branch of every State government; and plainly no *mandamus* will lie from the State judiciary, which is but another branch of the same government, to compel this authority to perform duties assigned to it by law. The Governor of a State is as independent in his sphere as are courts of justice in their sphere.

The only way in which State laws can be enforced against the executive authority, for any omission to obey them, is by the slow process of impeachment; and this would not directly rectify the wrong or change the executive action, but simply punish the Governor by removal from office for his misconduct. If he had violated the State law in delivering up a fugitive criminal, or in refusing to deliver him up, that fact would stand unchanged and uncorrected, notwithstanding the impeachment.

The legal result from these premises is this: That, in the sense of mere official *power* to act or not to act, under the Constitution and laws of Congress, and even under State laws, the executive of each State is not, in respect to the delivery of fugitive criminals, controllable by any other authority. If he refuses to comply with a requisition, there is no power in the General Government, or in the State of which he is the executive, or in that from which the demand proceeds, to compel him to do otherwise, any more than there is to compel him to veto a bill passed by the legislature, or to grant a pardon to a convicted criminal.

And so, if the executive decides to make a delivery upon

what he deems a sufficient showing of the necessary facts, there is no legal process that can restrain him from issuing his warrant and ordering the surrender of the accused party to the demanding State. He is by the law of Congress the sole depositary of the power. No bill of exceptions can be filed anywhere, or heard anywhere, for the purpose of review or reversal. The law makes no provision for an appeal or a writ of error.

**4. The Moral Obligation binding the Executive Authority.**

— It does not, however, follow that the Governor of a State is under no moral obligation in the premises. Just the reverse is the fact. A duty is attached to his office by the authority of law, and this law is just as valid for the purpose of imposing and defining the duty, as it would be if it could be enforced against him. When he entered upon his office he bound himself by the solemnities of an oath to perform, to the best of his ability, all the duties thereof; and one of these duties is to deliver up fugitive criminals in the cases specified by the Constitution and the law.

The Constitution says that, when the proper conditions are present, this delivery *shall* be made; and the law of Congress, enacted in pursuance thereof, defines the manner in which the constitutional mandate shall be carried into effect, including the agency for the delivery, and the proof to be supplied. The rule is imperative. The Governor of a State, in the discharge of this duty, is not a law-maker and an executive at the same time. He is the latter, but not the former. The law is already made for him, and his business is to apply and execute it whenever an occasion calls for the application.

There is no doubt that Congress might have established a purely Federal agency for the arrest and delivery of fugitive criminals. But inasmuch as the demand must, according to the Constitution, be made by the executive authority of the State from which the criminal fled, Congress saw fit to assign the duty of delivery to the executive authority of the State to which he flees and in which he is found.

**5. The Exercise of the Executive Judgment.** — The Supreme Court of the United States, in *Taylor v. Taintor*, 16 Wall.



366, referring to the duty to be performed, said: "In such cases the Governor acts in his *official* character and represents the sovereignty of the State in giving efficacy to the Constitution of the United States and the law of Congress." The Governor is the highest State officer; and when he delivers up a fugitive criminal, he does it in the name of the State, and the State in effect does it through him.

Chief Justice Booth, in *The State v. Schlemm*, 4 Harring. 577, said: "The right and power, under the Constitution of the United States, and the first section of the act of Congress of 1793, to demand, arrest, commit and surrender fugitives from justice, are exclusively vested in and confided to the executive authority of the State from which the fugitive has escaped, and that of the State where he has taken refuge." It appears then that, in the matter of inter-State extradition, two sovereign States, proceeding under the Constitution and the law, hold intercourse with each other—the one in demanding the fugitive criminal, and the other in delivering him up. This intercourse is conducted through their respective Governors, who are their highest executive officers, and who act in their "official character" and capacity.

There is no doubt that the demanding Governor has the right to exercise his judgment to the fullest extent in determining when an application is made to him, whether he will make a demand or not. The case, at that stage of its history, is exclusively in his hands; and it is for him to decide whether, in view of the documentary evidence submitted to him, the case is a proper one for the issue of a requisition. He cannot decide this question without examining the papers and passing judgment upon their character as to both form and contents, considered with reference to the Constitution and the law, and, indeed, without doing the very thing which a court of justice would do if considering the same papers in a proceeding on *habeas corpus*.

Let us then suppose that a State Governor, after such investigation, makes a demand and annexes thereto the papers which in his judgment are sufficient to authorize it, certifying to the authenticity of the same. This officially completes the case so far as he is concerned, and exhausts all his power in the premises. Does it complete the case so far as the Governor is concerned to whom

the demand is addressed? Is the latter absolutely bound by the judgment of the former, so that, after receiving the requisition and ascertaining that it is a requisition, he has nothing to do except to issue his warrant of arrest and surrender? Is he merely a *ministerial* officer, like a constable, marshal or sheriff, commanded by a court to serve a civil or criminal process, and concerned only to find and identify the person on whom it is to be served? This manifestly cannot be true.

The Governor of a State to whom a requisition is addressed, and by whom the duty of delivery is to be discharged, if at all, must, in the very nature of things, before he undertakes to perform the duty, ascertain its existence as a legal fact. No one can settle this question for him, and he cannot settle it for himself without passing judgment upon several matters of both law and fact. The opinion of courts in respect to his duties are entitled to the most respectful consideration; yet they relate to the duties of an officer of Government, over whom, in respect to these duties, the authors of these opinions have absolutely no jurisdiction. They are simply *dicta*, and, strictly speaking, of no authority.

The Constitution and the law are authoritative; but the opinions of judges as to the duties of a State Governor in a matter exclusively confided to him, are entitled to such consideration only as their eminent source suggests. If he adopts them he makes them his own by adoption. It is the executive judgment that is to rule the executive action in regard to a question that belongs exclusively to the executive office. There is no other judgment that can authoritatively rule that judgment.

A court of justice, when proceeding by *habeas corpus* in an extradition case, simply inquires whether the arrest is legal; and for the purpose of determining this question it examines the facts and applies the law to them. This is precisely what a Governor does or should do before he issues his warrant of arrest and delivery. The law is the same in both cases, and so the facts, with the exception of the Governor's warrant of arrest, are the same. The court is not dealing with one case, and the Governor with another. The law is to rule the Governor and the court alike, and the only question for either to determine is this: What does the law require in application to the facts as presented? The Governor has just as much right to consider and answer this

question for the purpose of ascertaining and discharging his duty as has a court of justice for the purpose of discharging its duty. Though not a judicial officer in the general sense, he must, in this case, by the very nature and terms of the duty assigned to him, perform at least a *quasi*-judicial function.

Judge Gilbert, in *The People, ex rel. Draper, v. Pinkerton*, 17 Hun, 199, said: "The duty of the Governor of this State to issue the rendition warrant was imperative. Having performed the *quasi*-judicial function of determining that the act of Congress had been complied with by the Governor of Massachusetts, the remaining part of his duty was ministerial only." Precisely so. The "ministerial" duty of issuing the warrant was in order after the examination of the case, and ascertaining that it came within the provisions of the Constitution and the law; and this, to say the very least, was a *quasi*-judicial function.

Chief Justice Taney, in *Kentucky v. Dennison*, 24 How. 66, spoke of the Governor's duty as merely "ministerial," like that of a sheriff or marshal in serving a process, "when the demand is made upon him and *the requisite evidence* is produced." He added: "The Governor has only to issue his warrant to the agent or officer to arrest the party named in the demand."

This "requisite evidence," to which reference was made, happens to be a very important item in the case. The question in each case of a demand is whether such evidence has been produced; and, before the "ministerial" duty is in order, this question must be decided. Who shall decide it? Plainly, the Governor who is to perform the duty, and that, too, in the exercise of his own judgment upon the law and the facts. The demanding executive cannot decide it for him, and no court can decide it for him.

If Chief Justice Taney meant that the duty is so purely "ministerial" that the executive has no right to exercise his own judgment upon the questions of law and fact that necessarily arise in every case, or to be governed by that judgment, then the opinion is clearly not correct, and not according to the uniform practice of State Governors. There is a very wide difference between the duty of a marshal or a sheriff required by a court to serve a process, civil or criminal, upon the person named in it, and the duty of a Governor who is requested to deliver up a fugitive criminal.

In the former case there are no questions of law to be passed upon, and, indeed, nothing to be done but to find the right man and serve the process. The officer does not issue the warrant he executes. But, in the latter case, there are several very vital questions of law, considered in application to the case before him, upon which the Governor must pass judgment, or, in the failure to do so, take a leap into the dark. He is addressed as the executive head of a State, and facts are presented to him for the purpose of showing that, under the Constitution and the law, he *ought* to make the delivery. Whether he ought to do so is just the question which he ought to consider, has a right to consider and must consider, in view of the whole case submitted to him as one of law and fact. He has more to do than simply "issue his warrant to an agent or officer to arrest the party named in the demand." Before he does this he must decide that the warrant ought to be issued; and here there is no analogy between his duty and that of a mere marshal or sheriff ordered to serve a process.

The real analogy is between a Governor in determining whether he will or will not issue a warrant of arrest, and a court of justice in determining, upon *habeas corpus*, whether the warrant, if one has been issued, was issued in conformity with law. The inquiry in both cases is one of law and fact; and this is just as proper an inquiry for a Governor to consider and determine, before he issues his warrant of arrest, as it is for a court to consider and determine, on *habeas corpus*, after a warrant has been issued, and is called in question as to its legality.

**6. The Questions to be Considered.** — The general question to be considered and determined, in the case of every requisition, is whether the requisition comes within the provisions of the Constitution and the law. This includes the following specific questions:

(1.) The first question relates to the genuineness of the papers, and involves the inquiry whether they are what they purport to be, or simply forgeries, and hence of no legal effect. If the papers bear the *prima facie* evidence of genuineness, and are transmitted to the Governor through the mail, or by a special messenger duly authorized, this will be sufficient for the purpose

of cognizance and action. The Governor would take official notice of them as genuine papers, in the absence of any reason for supposing otherwise.

(2.) The next question relates to the legal character of the papers. Are they duly executed? Is the copy of the indictment or affidavit certified as authentic by the demanding executive, and is it annexed to the demand, or, if not, does it accompany the demand, and is it produced with it, and is it referred to in the demand? Is the indictment such in point of fact upon its face, if this be the form of the charge, or if the charge be by affidavit, does it appear to be made before a magistrate? Does the requisition set forth, in general terms, the necessary facts? These are the pertinent questions for the Governor to consider.

(3.) The third question is a very vital one. Does the certified copy of an indictment or affidavit charge a crime against the party demanded as having been committed by him in the demanding State or Territory? This question was considered in chapter V of Part II, and to that chapter the reader is referred.

(4.) The fourth question is whether the party charged with crime is demanded as a fugitive from the justice of the demanding State or Territory, and whether there is sufficient evidence to show that the party has fled from such State or Territory and is to be found in the State or Territory on which the demand is made. This question was considered at large in chapter VI of Part II, and to that chapter the reader is referred.

Such, then, are the questions which are raised by a requisition made by the Governor of a State or Territory upon the Governor of another State or Territory, and upon which the latter Governor must pass judgment, in order to determine what is his duty in the premises. If the papers are genuine and legal in their character; if they charge a crime against the laws of the demanding State or Territory as having been committed by the party demanded, and if it is shown that this party is a fugitive from justice and is to be found in the State or Territory to which the demand is addressed, then the duty of causing him to be arrested and delivered up is imperative. No Governor can have any discretion that releases him from the performance of this duty, provided the party is at large and not arrested and held

under a civil or criminal process in the State or Territory to which the demand is addressed.

The Supreme Court of Ohio, in *Work v. Covington*, 34 Ohio St. 64, held that, "if the Governor of one State makes a requisition on the Governor of another State for the surrender of a fugitive from justice, and the case is shown to be within the provisions of the Constitution of the United States and the act of Congress on the subject, no discretion is vested in the latter Governor, but it is his imperative duty to issue his warrant of extradition."

The Supreme Court of Georgia, in *Johnston v. Reilly*, 13 Ga. 98, held as follows:

"When a demand is made by the Executive officer of one State for a fugitive from justice who has taken refuge in another State, under the provisions of the Constitution and laws of the United States, and a copy of the indictment found, or the affidavit made, as provided by the act of 1793, shall be produced and duly authenticated, as required by the act, charging the person so demanded with having committed a crime against the laws of the State from which he fled, the Executive officer of the State upon whom the demand is made for the surrender of such fugitive, must be governed by the record produced; he has no authority to make any addition to it, or to look behind the indictment or affidavit, and inquire whether by the laws of his own State, the facts charged therein would constitute a criminal offense; but it is made his *imperative duty*, under the supreme law of the land, which he has sworn to support, to surrender up such fugitive to the authorities of the State whose laws have been violated, having jurisdiction of the crime."

The doctrine of the courts has uniformly been that, when the prescribed conditions are supplied, the duty of surrender is imperative, and the arrest of the party is legal. (*The State v. Buzine*, 4 Har. 572; *The State v. Schlemm*, id. 577; *Nicholls v. Cornelius*, 7 Ind. 611; *Ex parte Pfitzer*, 28 id. 440; and *The Matter of Clark*, 9 Wend 212.)

The Governors of States have generally recognized the correctness of this principle. Differences among them have usually related to the construction of the Constitution and the law, or the question of fact whether all the prescribed conditions were present in a given case. Governor Seward, for example, in his correspondence with the Governor of Virginia, did not deny the

duty of delivering up the accused party if all the legal conditions were shown to exist. Yet he so construed the law as to hold that the duty did not exist in the case that was presented to him. He maintained that the law applied only to offenses that were crimes in the State on which the demand was made, as well as in the State making the demand. This was a false position, but it was no refusal to perform an admitted duty.

Governor Rice, of Massachusetts, in the case of *Kimpton*, while not pretending that there was any defect in the requisition made by the Governor of South Carolina, or in the accompanying papers, refused to comply with the requisition on the ground that, in his judgment, the object in procuring the indictment "does not appear to be for the purpose of trying Kimpton for the crime charged against him, but for a different purpose." (*New York Times*, August 31, 1878.)

This, in effect, charged South Carolina with fraud as to the motives of the indictment and prosecution, and made Governor Rice's opinion in respect to these motives a rule of law for his action. Was he justified in assuming this fraudulent intention, and then, on this basis, refusing to comply with the law of Congress? The proper answer to this question is in the negative. He had no right to impeach or assail the verity of the authenticated record before him on the ground that the prosecution was inspired by improper motives, or had an object different from the one that was apparent on the face of the papers. The existence and validity of the requisition being admitted, then its averments are not to be disputed.

On this point Mr. Wharton remarks: "A requisition can no more be impeached on the ground that improper collateral motives co-operated in obtaining it, than can a judgment of a sister State be impeached on the same grounds. If there was jurisdiction, if the Governor in the one case, or the judgment court in the other, were not fraudulently imposed upon, then the averments of the record in either cannot be assailed in the State in which execution is sought." (Wharton's *Crim. Plead. & Pr.* [8th ed.], § 34.)

It is due to candor to say that a different opinion in regard to the case of *Kimpton* was expressed in the first edition of this work. The author, however, having carefully examined that opinion, has seen what he deems a good reason for changing it.

It could not have been the intention of Congress that the Governor of a State, on whom the demand is made, should be permitted to deny or assail the legal efficacy of a duly authenticated record. That record in its recitals must be taken as true and entitled to "full faith and credit;" and if the recitals be in conformity with the law, then they are sufficient to establish the duty which the law imposes. There can be no reserved right of discretion adverse to the performance of a duty thus established.

**7. The Executive Warrant.**—The direction of the law is that the executive authority, when the proper conditions are supplied, shall cause the accused party "to be arrested and secured, and cause notice of the arrest to be given to the executive authority making such demand, or to the agent of such authority appointed to receive the fugitive, and cause the fugitive to be delivered to such agent when he shall appear."

This direction is qualified by two provisions. One is that "if no such agent appears within six months from the time of the arrest, the prisoner may be discharged." The other is that "all costs or expenses incurred in the apprehending, securing and transmitting such fugitive to the State or Territory making such demand, shall be paid by such State or Territory."

The executive authority of the State or Territory on which the demand is made, carries the direction of the law into effect by issuing a warrant of arrest and surrender. The following forms are examples of such warrants:

(I.) THE STATE OF NEW YORK.

STATE OF NEW YORK, }  
EXECUTIVE CHAMBER. }

The Governor of the State of New York,

*To the Sheriff of the County of \_\_\_\_\_, and the Sheriffs, Constables, and other Peace Officers of the several Counties in the said State:*

Whereas, it has been represented to me by the Governor of the State of \_\_\_\_\_, that \_\_\_\_\_ stand charged with the crime of \_\_\_\_\_, committed in the county of \_\_\_\_\_, in said State, and that \_\_\_\_\_ has fled from justice in that State, and has taken refuge in the State of New York; and the said Governor of \_\_\_\_\_ having, in pursuance of the Constitution and laws of the United States, demanded of me



that I shall cause the said        to be arrested and delivered to        , who is duly authorized to receive        into his custody, and convey back to the said State of        ;

And whereas, the said representation and demand is accompanied by        , whereby the said        , charged with the said crime, and with having fled from said State, and taken refuge in the State of New York, which        certified by the said Governor of        , to be duly authenticated ;

You are, therefore, required to arrest and secure the said        , wherever        may be found within the State, and to deliver into the custody of the said        , to be taken back to the said State from which        fled, pursuant to the said requisition.

Given, under my hand, and the privy seal of the State, at the City of Albany, this        day of        , in the year of our Lord one thousand eight hundred and seventy-        .

By the Governor.

*Private Secretary.*

## (II.) THE STATE OF PENNSYLVANIA.

THE COMMONWEALTH OF PENNSYLVANIA, }  
EXECUTIVE DEPARTMENT.

The Governor of Pennsylvania,

*To        , Sheriff of        County, or any other officer authorized by law to execute warrants :*

Whereas, it has been represented to me by His Excellency the Governor of the State of        , that        ha fled from justice in that State, and taken refuge in the State of Pennsylvania, and the said Governor having, in pursuance of the Constitution and laws of the United States, demanded of me that I shall cause the said        to be arrested and delivered to        , who is duly authorized to receive and convey        back to the State of        , there to be dealt with according to law ;

And whereas, the said representation and demand is accompanied by a copy of the        aforesaid, which is certified as authentic by the said Governor, and is now on file in the office of the Secretary of the Commonwealth ;

You are, therefore, authorized and required to execute this warrant in accordance with the act of the General Assembly entitled " An act to regulate proceedings under requisitions upon the Governor of this Commonwealth for the apprehension of

fugitives from justice," approved the twenty-fourth day of May, Anno Domini one thousand eight hundred and seventy-eight, and after the hearing therein directed, to deliver the said into the custody of the said , to be taken back to the State from which fled, pursuant to said requisition.

Given under my hand and the great seal of the State, at Harrisburg, this day of , in the year of our Lord one thousand eight hundred and seventy- .

By the Governor.

*Governor of Pennsylvania.*

*Secretary of the Commonwealth.*

### (III.) THE STATE OF MASSACHUSETTS.

#### THE SHERIFF'S WARRANT.

THE COMMONWEALTH OF MASSACHUSETTS. }

His Excellency Governor of the Commonwealth,

*To the Sheriff or to either of Deputies:*

Whereas, application has been made to me by the supreme executive authority of the State of for the delivery of charged with the crime of , and represented to be fugitive from the justice of said State of , and now in said , and I am satisfied that the demand is conformable to law, and ought to be complied with ;

I do, therefore, by virtue of the authority in me vested by the Constitution and laws of the United States, and of this Commonwealth, by this my warrant, under the seal of the State, authorize, empower, and direct you to seize and detain the said , and, after having given due notice of the demand made for surrender, and an opportunity to apply for a writ of *habeas corpus*, if shall claim such right of you, to transport to the line of this Commonwealth the said , and there deliver over to , who has been appointed by the Governor of the State of an agent to demand and receive ; and this warrant you are to serve at the expense of the said ; and I do hereby require all civil officers within this State to afford all needful assistance in the execution of this warrant ; and of your doings in the premises you will make due return to this Department within thirty days of the date hereof, after which this warrant is to become void.

In witness whereof, I have caused the seal of the said Commonwealth to be hereunto affixed, this      day of      , in the year of our Lord one thousand eight hundred and      , and of the Independence of the United States the one hundred and      .

By his Excellency the Governor.

*Secretary of the Commonwealth.*

#### WARRANT OF THE FOREIGN AGENT.

COMMONWEALTH OF MASSACHUSETTS. }

His Excellency, Governor of the Commonwealth,

To      , *greeting :*

Whereas, application has been made to me by the Governor of the State of      for the delivery of      , charged with the crime of      , represented to be a fugitive from justice, and supposed to be now within the limits of this Commonwealth; and whereas, it appears, from documents exhibited to me, and especially an executive warrant under the seal of the State of      , and dated      , that you the said      have been duly appointed by the supreme executive authority of the State of      to receive from the authority of this Commonwealth the said fugitive, and him to convey to the said State of      ;

I do, therefore, hereby, by virtue of the provisions of the Constitution and laws of the United States, and of this Commonwealth, authorize you, the said      , to receive the said      into your custody at the line of this Commonwealth from such officer of this Commonwealth as may be duly authorized to deliver him to you, and him the said      you are hereby directed to convey to the State of      , there to be dealt with as to law and justice may appertain; all which is to be without charge or expense to the said Commonwealth; and of your doings in the premises you will make due return to this Department within thirty days of the date hereof, after which this warrant is to become void.

In witness whereof, I have caused the seal of the Commonwealth to be hereunto affixed, this      day of      , in the year of our Lord one thousand eight hundred and seventy-      , and of the Independence of the United States of America, the one hundred and      .

By his Excellency the Governor.

*Secretary of the Commonwealth.*

## (IV.) THE STATE OF OHIO.

*To the Sheriff of                  County :*

Whereas, requisition has been made upon me by the Governor of the State of                  for the extradition of                  alleged fugitive from the justice of said State of                  , charged with the crime of                  as appears by a copy of                  , duly authenticated, and attached to the requisition aforesaid;

Therefore, I do hereby command you forthwith to arrest the said                  and bring                  before any Judge of the Court of Common Pleas of this State in whose district or jurisdiction                  may be found, to be examined upon said charge, and otherwise dealt with as provided by law; and, on this warrant, if so directed by such Judge, to deliver                  to                  the agent appointed by the Governor of the State of                  to receive                  ; and of this warrant, with your proceedings thereunder, make due return according to law.

In testimony whereof, I have hereunto subscribed my name, and caused the great seal of the State of Ohio to be affixed, at Columbus, the                  day of                  , in the year of our Lord one thousand eight hundred and eighty-                  , and in the one hundred and                  year of the Independence of the United States of America.

By the Governor.

*Secretary of State.*

It will be observed that the executive warrant, in each of these forms, being a special warrant, and resting for its validity on the law of Congress, is so worded as to show its validity upon its face. It hence contains the recitals specified by the law as the conditions of the authority to issue it. Without these recitals it would have no legal validity. It is a general principle of law that every process of arrest must be legally sufficient on its face. (*Jackson's Case*, 2 Flip. 183.)

The actual arrest is made by a subordinate officer of the State, acting under the authority of the Governor; and the warrant includes the power of making the arrest and delivering the fugitive to the agent of the State or Territory duly authorized to receive him, who must, within six months from the time of the arrest, appear for this purpose, or the prisoner may be discharged.

The local law in some States requires that before the party is actually delivered up for removal to another State or Territory, he shall have a reasonable opportunity to test the legality of his arrest by a proceeding in *habeas corpus*. This, while not inconsistent with the law of Congress, is a very proper provision in the interests of liberty, and as a protection to legal rights.

**8. Executive Re-hearing and Revocation.**—The Governor of a State, after issuing his warrant, and after the arrest of the party demanded, and prior to his delivery and actual removal from the State, may, if he shall see fit, grant a re-hearing of the case, and revoke the warrant. He is not precluded from so doing by the mere fact that he has issued the warrant, and that it has been served by the arrest of the party. On this point Governor Fairfield said :

“There being no question in my mind in regard to the power to recall the warrant which has been issued in this case, should circumstances justify it, I acceded readily to an application for a hearing of the parties, inasmuch as the first examination was, as such cases must generally be, *ex parte*, and because notice to the accused cannot now cause what at first it might have induced, the escape of the prisoners.” (24 Amer. Jurist, 226.)

Governor Cullom, of Illinois, took the same view in the case of *Gaffigan v. Merriok*, and coming to the conclusion in the light of the evidence submitted to him that these parties were not fugitives from justice, he recalled his warrant, and ordered them to be discharged. (Gov. Cullom's Opinion.)

The validity and legal effect of such an order were considered by the Criminal Court of Cook county in Illinois, in the case of *James Carroll*. Carroll, after being delivered into the custody of the agent of the State of Nebraska, and before his actual removal from the State of Illinois, was brought before the court by a writ of *habeas corpus*, and, while the hearing of the case was pending, the Governor of Illinois revoked his warrant, and sent the revocation to the court under the seal of the State. (Chicago *Legal News*, September 28, 1878.)

Judge Rogers held in this case that if the Governor had power thus to revoke his warrant, then the prisoner was entitled to be discharged ; and he further held that the Governor had this power,

and on this ground discharged the prisoner. The theory upon which Judge Rogers based this ruling is that the function of ordering the arrest and delivery of fugitive criminals is exclusively committed to the Governor of the State or Territory to which they have fled; that this function on his part is not so purely ministerial as to preclude the exercise of his judgment upon the facts presented to him; that if he shall seasonably discover that he has made a mistake in the issue of his warrant, or that he has been deceived by any false pretenses in the case, he has the right to "annul and revoke" his own order; and that such a revocation would at once be a legal reason for discharging the prisoner, since there would be no authority for thereafter holding him in custody.

In *Work v. Covington*, 34 Ohio St. 64, it appeared that a warrant issued by Governor Hayes, of Ohio, under which an arrest was made, was revoked by Governor Young, his successor in office; and the main question before the court was whether this revocation was valid. In regard to this point the court held as follows: 1. That "if a warrant for the surrender of a fugitive from justice is obtained in a case in which it should not have been issued, the Governor may revoke it, whether issued by himself or his predecessor." 2. That "where such warrant has been revoked by the Governor, no inquiry will be made in a proceeding on *habeas corpus*, in behalf of the alleged fugitive, as to the grounds of such revocation, although at the time of the revocation the fugitive may have been in custody of the agent of the demanding State."

Judge Okey, in delivering the opinion of the court in this case, said: "It appears from the abstract of the records in the Executive Department, and the case in 7 Law Rep. 386, that Governors Thomas W. Bartley, S. P. Chase, John Brough, J. D. Cox, R. B. Hayes, William Allen and Thomas L. Young, each in some form or another, revoked a warrant of extradition, and some of them exercised that authority repeatedly; and it is well known that other Governors of this and other States have often exercised the same power."

The theory upon which the assumption of this power rests is based upon the fact that the law makes the Governor of a State or Territory, to whom a requisition is addressed, the sole judge

as to the question whether, in the circumstances presented to him, the case exists which, according to law, requires the arrest and surrender of the accused party. If so, then until that party has been actually removed beyond the jurisdiction of the State or Territory, the right and power of the Governor to exercise his judgment continue. They are not exhausted or extinguished by his action so long as the party remains within his jurisdiction. He may correct his own errors if he does so seasonably. Being the sole authority for the issue of the warrant, he has power to cancel it. This would seem to be a just and reasonable view of the question.

**9. Conflict of jurisdiction.** It may be that the jurisdiction of the State or Territory, from which the fugitive criminal is demanded, has already attached to him by arrest in a civil action or for an offense committed therein; and in such an event the question would arise whether this jurisdiction is displaced and superseded by the demand for his delivery, or whether its operation should be completed before a compliance therewith. The law does not, in express terms, make any provision for such a case; yet it has been so construed by courts as to make this case an exception to the direct and absolute duty of delivery.

In *The State v. Allen*, 2 Humph. 258, the Supreme Court of Tennessee said: "By the Constitution and laws of the United States the Governor of Alabama had the right to demand Allen, and the Governor of Tennessee had the power to give him up. Indeed, it would have been his imperative duty to have done so, if he had not rendered himself, by the commission of crime, amenable to our criminal laws. This would have justified the Governor of Tennessee in detaining him till he had made satisfaction therefor."

The same question came before the Supreme Court of New Jersey in *The Matter of Troutman*, 4 Zab. 634. Troutman who was held under a *capias ad respondendum* in a civil action, was brought before the court by a writ of *habeas corpus*, in order that, being discharged from detention by the civil process, he might be delivered up by the Governor of New Jersey in response to the requisition of the Governor of Pennsylvania. The court declined to discharge him for this purpose. The doctrine held in this case is as follows:

"If a fugitive from justice, for whose delivery a requisition is made by the executive of the State from which he is such fugitive, be in actual confinement on criminal or civil process in this State, he cannot be delivered up. The Constitution and laws of the United States refer to fugitives at large. In such a case the requisition should be lodged with the sheriff, whose duty it would be, upon the prisoner's discharge from his previous arrest, to detain him thereon until notice could be given to the party presenting the requisition."

The same view was taken by the court in *The Matter of Benjamin W. Briscoe*, 51 How. Pr. 422. This case was an application to the court by A. M. Perkenson, the sheriff of Fulton county in the State of Georgia, by *habeas corpus*, to procure the delivery of Briscoe to him, as an alleged fugitive from the justice of Georgia, under the warrant of arrest and surrender issued by the Governor of New York, upon the requisition of the Governor of Georgia. Briscoe was at the time held and detained by the sheriff of the city and county of New York, in pursuance of an order of arrest made by Mr. Justice Donohue in a civil action; and the sheriff, in consequence of this order, refused to deliver him up to Perkenson.

Judge Westbrook held that, under the law of New York, he had no power to discharge Briscoe from his arrest in the civil action, as the case did not come within the law in regard to *habeas corpus*.

In reference to the question whether, when a party is detained in one State because the laws of that State have claims upon him, he can be extradited and taken to another State, before the justice of the State which holds him has first been satisfied, Judge Westbrook said:

"We are clearly of the opinion that no law enables the Governor of this State to abridge the legal remedies which suitors in its courts are pursuing against a party, and that consequently no duty is imposed upon the court to vacate its own order of arrest and aid the executive mandate. \* \* \* Briscoe, being detained under the laws of this State, cannot be discharged until the demands of those laws have been fully satisfied and discharged."

The extradition papers in this case were correct, and in themselves sufficient to authorize and require the delivery of Briscoe.



But, since the jurisdiction of a New York court had already attached to him and was still operative, he could not be delivered up until that jurisdiction had disposed of the case.

The Supreme Court of the United States, in *Taylor v. Taintor*, 16 Wall. 366, expressed the following opinion in regard to the same question: "When a demand is properly made by the Governor of one State upon the Governor of another, the duty to surrender is not absolute and unqualified. It depends upon the circumstances of the case. If the laws of the latter State have been put in force against the fugitive, and he is imprisoned there, the demands of those laws may first be satisfied. The duty of obedience then arises, not before."

Reference was made by the court to *Troutman's Case*, 4 Zab. 634, in which it was declared that "the Constitution and the law refer to fugitives at large, in relation to whom there is no conflict of jurisdiction." The court also said: "If the demand had been made upon the Governor of Connecticut, he might properly have declined to comply until the criminal justice of his own State had been satisfied. This right, it is not doubted, he would have exercised."

The legal principle involved in these decisions is that, where jurisdiction has already attached to a case, it is, in the absence of any provision to the contrary, to be deemed exclusive until it has performed its function. (*Hagan v. Lucas*, 10 Pet. 400; *Taylor v. Carryl*, 20 How. 583; *Ex parte Jenkins & Crosson*, 2 Amer. Law Regis. 144; and *Taylor v. Taintor*, 16 Wall. 370.) There is nothing in the extradition clause of the Constitution, or in the laws of the United States for carrying it into effect, to suspend the application of this principle. Hence the demand for the delivery of a fugitive criminal does not abrogate or postpone a lawful jurisdiction that has been put in force against him for an offense committed in the State or Territory to which he has fled, and on which the demand is made. The same principle applies when the party is held under a civil process. (*Troutman's Case*, 4 Zab. 634.) This jurisdiction, being then operative, takes precedence of the one claimed until its purpose shall have been completed. The Governor of the State has no power, by the issue of his warrant, to arrest its action.

The same rule operates where the party is by bail released from actual confinement. He is, to all intents and purposes, still in the custody of law, as a prisoner against whom the law has been put in force, and in respect to whom its claims are not yet determined. He is not discharged from his arrest, and is under recognizance to appear whenever wanted. His bail may at any moment surrender him, and then his imprisonment would be actual.

Some of the States, in making it the duty of their respective Governors to deliver up fugitive criminals in the circumstances specified, qualify the duty by the proviso that such criminals are not held in custody or under bail to answer for offenses against the laws of the United States, or against the laws of the States in which they have sought asylum. (The Code of Alabama, 1876, part 4, chapter 1, § 3986; The Revised Code of Iowa, 1880, vol. 2, § 4175; Revised Statutes of Indiana, 1881, chapter 3, article 3, § 1603.)

The above particulars — nine in all — present the various questions that stand connected with the executive delivery of fugitive criminals. Both the Constitution and the law of Congress were intended to secure a practical result of primary importance to all the States of the Union; and that result is to prevent criminals from escaping justice by flight from one State to another. When the provision made for this purpose is used according to its terms and intent, it is properly used. When sought to be used for any other purpose, the attempt is a fraud.

The Constitution and the law assume that the Governors of States will be men of intelligence and integrity, and hence that, whether demanding or delivering up fugitive criminals, they will be no parties to any attempted frauds, but will honestly administer the law according to its letter and intent, and solely with reference to the end designed to be secured. And it is simply just to say that their general course on this subject has corresponded with this assumption.

## CHAPTER IX.

## THE TRANSPORTATION OF THE FUGITIVE.

**1. Appointment of an Agent.** —The Constitution says nothing about the manner in which the party delivered up shall be "removed to the State having jurisdiction of the crime." It simply declares that he shall be delivered up for this purpose.

The law of Congress, assuming that the executive of the demanding State or Territory has the power to appoint an agent "to receive the fugitive," and that such an appointment will be made in each case, directs the delivery to be made "to such agent when he shall appear." This fully recognizes the legal validity of the executive appointment of an agent, and regards the person appointed as temporarily an officer of law for the purpose of receiving and transporting the fugitive to the State or Territory demanding him. Whether the appointment shall be made at the time of the demand, or subsequently thereto, is a point that the law does not determine.

The practice of Governors on this subject is well known. They always appoint a receiving and transporting agent, and usually intrust him with all the extradition papers, including the official evidence of his appointment. He proceeds with these documents to the State or Territory in which the fugitive is supposed to have taken refuge, and in virtue of them makes the demand in the name of the authority he represents.

**2. Limitations.** —The law contains two limitations, one of which relates to time, and provides as follows: "If no such agent appears within six months from the time of the arrest, the prisoner may be discharged." The design of this provision is to fix a time within which the prisoner arrested may be held in custody for delivery, and within which the agent must appear to receive him. The time fixed having elapsed with no such appearance, the prisoner may then be discharged. How the discharge shall be effected, whether by *habeas corpus* or by the executive authority that ordered the arrest, the law does not expressly declare. Either method would seem to be lawful.

The other limitation relates to the expenses of the proceeding; and here the rule is, that "all costs or expenses incurred in the apprehending, receiving, and transmitting such fugitive to the State or Territory making such demand shall be paid by such State or Territory." It is a general principle in all extradition, whether inter-State or international, that the authority seeking to procure it shall pay the expenses of the whole process. The agent appointed to receive the fugitive must be prepared to meet this requirement, and must actually meet it, or he will not be entitled to the delivery and custody of the prisoner.

The duty of the delivering State or Territory is entirely exhausted when, upon the conditions specified, the party demanded is arrested and delivered to the duly authorized agent of the demanding State or Territory.

**3. The Powers and Protection of the Agent.**—Section 5279 of the Revised Statutes of the United States contains the following provision on this subject:

"Any agent so appointed, who receives the fugitive into his custody, shall be empowered to transport him to the State or Territory from which he fled. And any person who, by force, sets at liberty or rescues the fugitive from such agent while so transporting him, shall be fined not more than five hundred dollars, or imprisoned not more than one year."

This gives to the agent the powers of a Marshal or a Sheriff in holding and transporting the prisoner to the place of his destination, and, moreover, protects him, by a penalty, against any forcible interference with him in the discharge of his duty. Though appointed by the Governor of a State or Territory, he is, in the discharge of this duty, acting under the authority of a law of the United States.

The law, of course, assumes the fact of his appointment, and that wherever he goes with the prisoner he will bear with him the evidence of this fact, and also of the fact that the prisoner has been delivered into his custody by lawful authority. Possessing this evidence, he is not a kidnapper, but a duly authorized officer of law, discharging the duty which the law imposes, and entitled to its protection.

Some of the States have provided by law for the transmission of the fugitive through them when necessary to carry him to the State having jurisdiction of the crime. There is no objection to such legislation, if not inconsistent with the law of Congress; yet it seems unnecessary. The right of such transmission is secured to the agent holding the prisoner by the supreme law of the land; and all forcible interference with its exercise, for the purpose of rescuing the prisoner, is made a penal offense against the United States.

**4. Judicial Construction.** — The courts have seldom had any occasion to construe the law in respect to the agents appointed to receive and transport fugitive criminals. Cases calling for the expression of an opinion in regard to the powers, duties, and liabilities of these agents, have rarely come before courts. The following cases are all that we have been able to collect:

(1.) *Pettus v. The State*, 42 Ga. 358. The Supreme Court of Georgia laid down the following doctrine in this case:

“Where a requisition is made by the executive authority of this State for any person as a fugitive from justice, on the executive authority of another State, and the Governor of this State appoints an agent to receive such fugitive to be transported to this State, it is the duty of such agent, without unnecessary delay, to bring said fugitive before the Governor of the State, unless otherwise directed, in order that said fugitive may be turned over, under the order and direction of the Governor, to the proper civil authority of the county in which the offense was committed.”

“If the defendant, as such agent, had such fugitive from justice in his custody, for the purpose of transporting him from the State of South Carolina, on his [the Governor's] requisition, as set forth in the record, without any unreasonable delay, then the defendant was not guilty of false imprisonment in the detention of said fugitive from justice for that purpose, and the court below should have so instructed the jury.”

The case in the court below was an action for alleged false imprisonment brought against the agent of the State of Georgia; and in respect to it the Supreme Court stated the above doctrine.

(2.) *In re Bull and Turtle*, 4 Dill. 323. It appeared, on the hearing of this case, that the relators, as agents of the Gov-

ernor of Illinois, had obtained the custody of John H. Blair, as a fugitive from justice, by the delivery of the Governor of Nebraska, and that, instead of taking him to Chicago by the natural and the nearest route, they first took him to St. Louis, then to the City of New York, and thence to England. For this they were subsequently indicted in Nebraska, on the charge of kidnapping. Being arrested on this charge, they sued out a writ of *habeas corpus*, and claimed protection against the arrest under the laws of the United States. Judge Dillon, in this case, held as follows:

(a.) "A person indicted in a State court for acts done in pursuance of a law of the United States, may be discharged from custody under such indictment on a writ of *habeas corpus* issued by a Federal court or judge under section 753 of the Revised Statutes of the United States."

(b.) "The relators were indicted in a State court for kidnapping, and were in custody under such indictment; they applied to a Federal judge for a writ of *habeas corpus*, stating, in their petition for the writ, that they were indicted for acts done by them under sections 5278 and 5279 of the Revised Statutes of the United States, in executing the requisition for the surrender of the person alleged to have been kidnapped, as a fugitive from justice; it appearing to the Circuit Court that this claim of the relators is not true: *Held* that they were not entitled to be discharged, and the order of the district judge, discharging the relators, was reversed."

Judge Dillon regarded these relators as having both exceeded and grossly abused their authority as agents, and, hence, as not entitled to the protection of the laws of the United States, under which they claimed to have acted, when called to answer therefor in a State court. It is only when the agent discharges the duty assigned to him, in pursuance and the proper execution of the law, that he is protected by the law under which he acts.

(3.) *The Matter of Titus*, 8 Ben. 411. The facts, in this case, were as follows:

Titus was commissioned by the Governor of the State of Arkansas to present to the Governor of the State of New York a requisition for the surrender of one McDonald, as a fugitive from justice. As the agent authorized to receive the fugitive, he presented the requisition and the authenticated copy of the indict-

ment charging McDonald with crime; and thereupon the Governor of New York issued his warrant to the sheriff of Kings county, ordering the arrest of McDonald and his delivery to Titus as the agent of the State of Arkansas. After the arrest and before the delivery, McDonald was released from the custody of the sheriff, upon *habeas corpus*, by a justice of the Supreme Court of the State; and then he commenced a suit against Titus for malicious prosecution, and obtained an order from the Supreme Court for his arrest.

Titus, being in custody under this order, applied for a writ of *habeas corpus*, to the District Court of the United States for the Eastern District of New York, setting forth the above facts, and claiming a discharge from the arrest, on the ground that he was in custody by reason of acts done in pursuance of the laws of the United States and justified by those laws. Judge Benedict, in respect to the questions presented and involved in this case, held as follows:

(a.) That the only acts charged upon Titus were acts done by him as the agent appointed by the Executive of the State of Arkansas, which acts were those prescribed by the act of Congress of 1793, now section 5278 of the Revised Statutes of the United States.

(b.) That the court therefore had jurisdiction, under section 753 of the Revised Statutes, to grant the writ of *habeas corpus* for the purpose of inquiring into the cause of his restraint.

(c.) That the Governors of the States and their agents, in reference to the extradition of fugitives from the justice of a State, were compelled to rely upon the statutes of the United States for authority to do the acts required thereby, and the statutes of the United States, when complied with, afford them justification.

(d.) That the petitioner was therefore entitled to the writ of *habeas corpus*.

(e.) That Titus, who was simply the messenger of the State of Arkansas, was not bound to look into the indictment on which the requisition was founded, and determine at his peril whether it charged a crime within the meaning of the laws of the United States.

(f.) That the arrest of McDonald was by the order of the Governor of the State of New York, and that whatever Titus had done, in presenting the requisition to the Governor, was only a ministerial act for which he was justified by the direction of the Governor, and therefore he incurred no personal liability.

(g.) That the allegation of malice against Titus did not change the case, so long as the acts done were within the scope of the authority conferred upon him, and justified by the laws of the United States.

The main point in the ruling in this case is that an agent duly appointed to receive the fugitive, and acting in pursuance of the authority conferred upon him by the laws of the United States, is protected by these laws, and that, if for acts thus done he is imprisoned by a State court, a Federal court may, under section 753 of the Revised Statutes of the United States, give him the necessary relief by a writ of *habeas corpus*.

(4.) *The case of In re Burke.* This case, published in the St. Paul and Minneapolis *Pioneer Press*, January 25th, 1879, came before Judge Nelson, of the District Court of the United States for the District of Minnesota. It involved a novel question in the construction of extradition law. The following is the deliverance of Judge Nelson in the case:

It is important that an early decision should be reached. I have examined the papers and considered the evidence. My impression on the hearing has ripened into a conviction, and I am prepared to announce the result.

On January 15, 1879, James H. Burke presented a petition for a writ of *habeas corpus*, alleging that he is restrained of his liberty and held in custody by the sheriff of Ramsey county, in the State of Minnesota, for an act done by him under the Constitution and laws of the United States.

This act fully set out in the petition on file, and alleged to be the sole and only reason for his detention, is the arrest of one Samuel Frank, under and by virtue of the warrant of Governor Pillsbury, of the State of Minnesota, issued upon the requisition of Governor Cullom, of the State of Illinois, demanding the arrest of said Frank as a fugitive from justice of the State of Illinois, accompanied by an affidavit or sworn complaint, charging that he committed a criminal offense in Cook county, to-wit: "Designedly obtaining of goods of another by false pretense, with intent to cheat and defraud, on or about the 20th day of August, 1878, in that, on said day Samuel Frank did, in said county and State, with intent to cheat and defraud Leopold Bros. & Co., \* \* \* doing business in said county, at Chicago, designedly, by false pretense, obtain from said Leopold Bros. & Co., goods and merchandise, etc."

The demand of Governor Cullom is accompanied by the application of Leopold Bros. & Co., stating that Frank is in Ramsey



county, Minnesota, and asking for the requisition; and a certificate of the judge of Cook county, that the ends of justice require the return of said Frank; also the appointment of the petitioner, James H. Burke, in accordance with the laws of the United States, as messenger and agent to receive from the proper authorities of the State of Minnesota, Samuel Frank, and convey him to the State of Illinois, to the sheriff of Cook county.

The requisition and demand of Governor Cullom also certifies the copy of affidavit annexed as authentic, and that obtaining property by false pretenses, charged therein, is a crime against the laws of the State of Illinois.

A writ of *habeas corpus* was issued under section 753, Revised Statutes of the United States, and the sheriff of Ramsey county has made return thereto, that he holds the petitioner by virtue of certain proceedings, warrants and commitments attached, to-wit: Certified copy of a warrant of a judge of the district court of Ramsey county, commanding the arrest on the complaint of C. D. O'Brien, to wit: "That on the 9th day of January, 1879, at the city of St. Paul, in the county of Ramsey and State of Minnesota, one James H. Burke then and there being, did, without lawful authority, and willfully and maliciously and with force and arms and with a wrongful intent, to-wit: With the intent to extort money from one Samuel Frank, \* \* \* cause said Frank to be seized and taken out of said State, and confined him against his will with the design and intent to extort money from him," etc. Also certified copies of warrants of commitment by the judge of the municipal court of the city of Saint Paul.

The petitioner files a replication that the acts alleged in the complaint and warrant of arrest annexed to the return of the sheriff, and which constitute the supposed offense, were in truth and in fact the same set out in his petition.

On the hearing testimony has been introduced to disprove the complaint filed and the warrant issued by the District Court of Ramsey county, and also for the purpose of showing that the petitioner intended to abuse the warrant of the executive of Minnesota to take Samuel Frank out of the State, not for the purpose of delivery to be tried for the crime of which he is accused. This latter testimony consisted of conversations between the petitioner and Frank when in his custody, and statements and propositions made to the counsel of Frank after he had been discharged from custody by a writ of *habeas corpus* and re-arrested, for the purpose of allowing him to proceed peaceably and without molestation to the State of Illinois with his prisoner.

A certified copy of the records of the County Court of St. Croix county, Wisconsin, is also introduced in evidence showing the discharge of Frank from the custody of the petitioner by a writ of *habeas corpus* issued by the judge of that court, in the return

to which writ this petitioner presented the requisition of Governor Cullom, of Illinois, and accompanying papers, and the warrant of Governor Pillsbury, of Minnesota, authorizing his arrest, which are set up in his petition here as a justification of his action.

The questions to be determined in this case are :

I. Was the petitioner protected by the warrant of the executive of the State of Minnesota, authorizing him to arrest Frank, issued on the demand of the executive of the State of Illinois and accompanying affidavit charging him with committing an offense which was made a crime by the laws of the State of Illinois? Unless some act was done under it not authorized by the warrant, this proposition does not admit of argument.

The law only obliges an officer to look to his warrant and obey it, if regular and valid on its face and issued by a person authorized to issue warrants of that description, under certain circumstances. The jurisdiction of the executive of Minnesota to issue a warrant is not denied, but it is asserted this warrant was procured in bad faith and the petitioner intended to pervert the remedy and serve other purposes. The petitioner is only the agent appointed by Governor Cullom, of Illinois, to receive and deliver Frank, the alleged fugitive from justice, and the proceedings were initiated by the authorities of that State, and not by him.

Admitting that the statements and declarations of the petitioner tended to show that, in his opinion, which is the most that can be claimed for them, Frank was arrested by a requisition for the purpose of getting him into custody so that he might be readily carried to Illinois with a view of perverting the remedy, we must assume also that the authorities of the latter State committed a trick and deception, although the executive action and all the proceedings are *prima facie* evidence of their regularity and legality; and further, that if the proceedings anterior to the issue of Governor Pillsbury's warrant, in the opinion of this officer, were a deception, he may not execute it; and if he does he is guilty of the crime of kidnapping. The opinion of the agent cannot overcome the presumption of regularity which attaches to the proceedings, and he cannot be permitted to decide upon matters submitted by law to the executive.

If the petitioner, after the arrest, had done an act not warranted by the executive writ, showing a design on his part to use it for a purpose not contemplated by the extradition proceeding, as, for example, taken his prisoner to a foreign country (see *In re Bull*, 4 Dill. 324) there could be little doubt he must answer to the criminal laws of the State of Minnesota.

But I can find nothing in the proceedings and the testimony or in the conduct of the petitioner which shows that he "without

lawful authority, willfully and maliciously and with wrongful intent caused Frank to be seized and taken out of the State with the design to extort money from him."

So long as he had Frank in custody he was proceeding by a direct route to take him to the State of Illinois, and on his way he did no act which can be construed into a design to take him to any other place or use the remedy as a pretext for any purpose other than the extradition papers contemplated. It is true the statements and conversation of the petitioner might convey the impression that Frank would be able to stop the criminal proceedings in the State of Illinois by arranging his private indebtedness incurred by the false pretense and he would aid him in so doing, but a court cannot on such suspicion declare that the purpose of the officer was to kidnap his prisoner. He might have made such statements with the design of quieting Frank and his counsel, and thus avoid any delay or inquiry into the regularity of his authority.

However censurable to some persons his conduct might appear, I cannot say he abused his authority and is not protected in the arrest of Frank by the warrant of Governor Pillsbury.

II. Was the petitioner justified by virtue of the authority conferred upon him by the original warrant of the executive of Minnesota, and the other extradition papers, in the re-arrest of Frank after his discharge by the State court of Wisconsin and his return to Minnesota?

If the prerequisites of the law of 1793 are complied with, and the warrant of the executive of the State to which the fugitive has fled is issued on the requisition of the executive of the demanding State, accompanied by a copy of an affidavit, charging a crime, under the laws of the latter, certified as authentic by the executive, and an arrest is made and delivery to the agent of the demanding State, then the person so arrested is legally restrained of his liberty and may be removed to the State having jurisdiction of the crime. A discharge of the person under the writ of *habeas corpus*, by the judge of any court, whether State or Federal, would be *coram non judice*, and void.

This presents the question whether the judge of St. Croix county exceeded his jurisdiction under the writ of *habeas corpus*, and his discharge of Frank is a nullity? I think this action of the State court of Wisconsin is the first reported instance of any interference by the judiciary of a State through whose territory the fugitive from justice is being transported, after the concurrent action of the two States alone interested in the transaction.

If there is any authority of law for it, then it becomes necessary, before the act of Congress providing for the surrender of fugitives from justice can be successfully enforced, that more than two States must at the time the requisition is made assent to the

arrangement. It has always been supposed that not only the original States of this Union who adopted and accepted the Constitution, but also all States subsequently admitted on an equality with the original States, agreed to be bound thereby, and recognize the full force of every provision thereof, any thing in the constitution and laws of the State to the contrary notwithstanding.

The first section of the fourth article of the Constitution provides that "full faith and credit shall be given to the public acts, records and judicial proceedings of every other State," etc. And the last clause of the second section of the same article, the subject-matter thereof appearing to be in the minds of the framers of the Constitution, in connection with the first section, provides that "a person charged in any State with treason, felony or other crime, who shall flee from justice and be found in another State, shall, on demand of the executive authority of the State from which he fled, be delivered up, to be removed to the State having jurisdiction of the crime." To carry out this latter provision of the Constitution the act of 1793 was passed.

The papers presented on his return to the writ of *habeas corpus* before the State court of Wisconsin, and now by the petitioner before me, show that all the prerequisites are complied with, and if "full faith is to be given to the public acts, records and judicial proceedings" of any other State in the State of Wisconsin, these papers, duly authenticated under the seals of the States of Minnesota and Illinois, and signed by the executive of each State, are so entitled. If so, then under the writ of *habeas corpus*, the court in Wisconsin, on discovering, by the return of the agent, that the person in custody was held by virtue of the Constitution and laws of the United States in respect of fugitives from justice, and the two States interested in the transaction had concurred in their action, should have proceeded no further. Any action obstructing this constitutional right was absolutely void.

But if wrong in this view of the case, conceding that the Wisconsin court had jurisdiction to proceed further than an inquiry into the authority by virtue of which Frank was held, and examine into the legality of the requisition, affidavit and other papers, let us see whether the proceedings are not regular, legal and in conformity with the act of Congress of 1793.

The term "crime" in this article of the Constitution means any offense indictable by the laws of the State demanding the surrender, and is not confined to common law crimes. While the affidavit annexed to Gov. Cullom's requisition, tested by the common-law rule, would not, perhaps, be sufficient to charge a crime of "false pretenses," yet when the requisition is examined it is there stated that the offense with which Frank is charged in the affidavit annexed is a crime under the laws of the State of Illinois. The warrant of Gov. Pillsbury being issued not on the affidavit alone,

but on the demand of Gov. Cullom also, the requirements of the law of 1793 were fulfilled, and is a conclusive reason to my mind why the action of the Wisconsin court is a nullity.

To sum up in the language of Mr. Spear, an able writer upon inter-State extradition procedure: "It necessarily results, when the executive warrant for a surrender of the alleged fugitive has been issued in conformity with law, no judicial power can interpose to arrest or defeat its operation. Unless countermanded by the authority issuing it all the remedies of the accused party, if he has any, must be sought in the State or Territory to which he is surrendered."

The petitioner was, therefore, protected by the executive warrant in the re-arrest of Frank, and he is discharged from the custody of the sheriff.

The ruling of Judge Nelson, in the light of the papers presented in this case, was undoubtedly correct. No court, upon the basis of these papers, could have any authority to discharge Frank from the custody of Burke, and much less a court of a State through which the latter, by a natural route, was merely transporting the former as a prisoner, in the exercise of lawful authority derived from the concurrent action of the two States that were directly concerned in the matter.

The Wisconsin judge, having issued his writ of *habeas corpus*, on discovering that Burke was the duly authorized agent of the State of Illinois and that he held Frank under a warrant of arrest and delivery from the Governor of Minnesota, should at once have suspended the whole proceeding, and remanded the prisoner to the custody of the agent. He was bound by the Constitution of the United States to give "full faith and credit" to this documentary evidence of lawful authority. He had no jurisdiction to discharge the prisoner, and his discharge did not vacate that authority or dispossess Burke of the right under this authority to re-arrest him in Minnesota. His action was "absolutely void."

The Constitution expressly declares that the person described shall "be delivered up, to be removed to the State having jurisdiction of the crime," which implies the right of such removal or transportation through any number of States. The law of Congress as expressly declares that "any agent so appointed, who receives the fugitive into his custody, shall be empowered to trans-

port him to the State or Territory from which he has fled." The agent acting under this authority has a right to hold the fugitive and transport him to the demanding State or Territory.

If the question whether the requisition and delivery are conformable to law, is to be judicially considered by *habeas corpus*, the proper place for such consideration is in either the demanding or the delivering State, or in both. "Full faith and credit" are to be given in every other State to the executive acts which vest authority in the agent: and hence these acts are conclusive in respect to his power, and open to no inquiry as to their validity in other States through which the fugitive is being transported, and which have no other connection with the matter involved. The utmost limit to which courts in other States can lawfully extend their power, is to ascertain whether the agent is clothed with the requisite authority, without any inquiry into the antecedent proceedings; and this fact, if appearing, should at once be the end of the case.

Admit the principle assumed by the Wisconsin Judge in this case, and it would lead to great difficulties, if not endless confusion in the execution of the extradition provision of the Constitution. The agent would be liable to have his authority, and also the validity of the proceedings by which it was acquired, called in question by any court having the power to issue a writ of *habeas corpus*, through whose jurisdiction in every State he might pass with the prisoner. Any number of such writs might be issued in succession. Every writ would involve the legal possibility that the prisoner might be discharged, and thus the action of the two States directly concerned in the transaction, might be rendered wholly nugatory. Such a possibility is plainly inconsistent with both the letter and intent of the Constitution, and of the law of Congress to carry it into effect.

## CHAPTER X.

## REVIEW BY HABEAS CORPUS.

## SECTION I.

## THE RIGHT OF SUCH REVIEW.

1. **The General Principle.**— It is a general principle in the jurisprudence of this country, whether State or Federal, that, where a party is forcibly deprived of his liberty, a competent court of justice may, by a writ of *habeas corpus*, inquire into the cause of his restraint, upon his application therefor, and may, if upon the hearing of the case the restraint be found to be without legal authority, grant the party summary relief by ordering his immediate discharge. This is one of the well-settled principles of American law.

The writ of *habeas corpus* is a judicial order “directed to the person detaining another, and commanding him to produce the body of the prisoner at a certain time and place, with the day and cause of his caption and detention, to do, submit to, and receive whatever the court or Judge shall consider in that behalf.” Bouvier’s Law Diction.)

If the application for the writ shows upon its face that the restraint is lawful, no writ will be issued, as there is no occasion for it in such a case. If, on the other hand, the application fairly raises the question whether the custody is lawful, the writ will be issued, and this question will be considered and determined. The inquiry, upon the hearing of the case, is confined to the existence and validity of the process by which the party is restrained of his liberty. If the restraint be lawful, the party will be remanded to custody, and if it be unlawful in the judgment of the court or Judge, then he will be discharged. The lawfulness of the custody is the single and only question to be determined.

The power to issue this writ is regulated by law, not only as to the courts that may exercise the power, but also as to the cases to which it is applicable. The courts derive their powers from the

law, and are to exercise it in the manner and within the limits established thereby.

**2. Applicable in Extradition Cases.**—The law of Congress, relating to fugitive criminals, does not provide for proceedings in *habeas corpus* in extradition cases. The practice of the courts, both State and Federal, has, however, assumed that when the Governor of a State or Territory has issued his warrant for the arrest and delivery of an alleged fugitive from justice, and the arrest has actually been made, the legality of that warrant is a proper subject for judicial inquiry by a writ of *habeas corpus*, if the writ be issued before the removal of the accused from the jurisdiction of the court.

This has been done in numerous instances, and not infrequently persons arrested and held under the authority of executive warrants have been discharged. The discharge is always based on some illegality in the proceedings. The uniform rule in these cases where the proceedings are found to meet all the requirements of the law, is to remand the prisoner to custody under the executive warrant ordering his arrest and detention.

In *The People v. Brady*, 56 N. Y. 182, Judge Andrews, in stating the opinion of the court, said that the question "is whether the papers presented to the executive of this State, and upon which the relator as a fugitive from justice was demanded, were in form and substance sufficient to authorize the executive warrant under which the relator was held." The court passed judgment upon this question; and one of the propositions decided, as stated in the syllabus of the case, is the following: "The courts have jurisdiction to interfere by writ of *habeas corpus*, and examine the grounds upon which the executive warrant for the apprehension of an alleged fugitive from justice from another State is issued, and, in case the papers are defective and insufficient, to discharge the prisoner."

In *The Matter of Manchester*, 5 Cal. 237, it was held that "where a party escaped from another State is arrested as a fugitive from justice, the judiciary, by writ of *habeas corpus*, have jurisdiction to examine into the case; and although the courts possess no power to control the executive discretion, and compel a surrender, yet the executive having once acted, that discretion



may be examined into, in every case where the liberty of the subject is involved."

In *Ex parte Willard & Wife*, the opposite doctrine was adopted in 1814 by Judge Ray of South Carolina, who held that the case of a person, arrested as a fugitive from justice by the warrant of a Governor, is excepted from the *habeas corpus* remedy "by the operation of the Constitution and laws of the United States." (Sergt. Const. Law, pp. 395, 396.)

There is no doubt that the legislature of a State, in organizing its courts and defining their powers, may, unless restrained by a special provision in the constitution thereof, establish such an exception; yet there is nothing in the Constitution and the laws of the United States that has this effect.

The fact that the Governor of a State is authorized by Federal law, upon the conditions specified, to cause the accused party to be arrested and delivered up, does not imply any negation of power in courts to inquire, by writ of *habeas corpus*, whether the party arrested is restrained of his liberty in conformity with the conditions named. If such is not the fact, as may be, and in several instances has been the case, then the arrest is illegal; and for this the writ of *habeas corpus* is the proper remedy. There is no reason in the nature of the proceeding, or in the powers and duties of the Executive, why the remedy should not apply to such a case.

## SECTION II.

### CASES OF HABEAS CORPUS.

Courts are not the direct agency, provided for by law, in the arrest and delivery of criminals who have fled from one State or Territory to another; and the only mode in which they can exercise any power in such cases, after a requisition has been made, and an executive warrant of arrest and delivery has been issued, is by a writ of *habeas corpus*, for the purpose of inquiring into the lawfulness of the arrest and detention. This power they have frequently exercised, and in the exercise thereof they have had occasion to construe the Constitution and law of Congress on this subject.

The special object of this section will be to state a list of cases, some of which have already been referred to, in which the courts

have considered the law on the subject of extradition, and expressed their opinions in regard to it. These cases give the construction of the Constitution and the law as found in judicial decisions. The proposed list is as follows :

**1. The State v. Buzine, and The State v. Schlemm, 4 Harring. 572, 577.** These two cases are placed together because they are identical as to the party arrested, and as to the charge of crime.

The first case arose from a preliminary proceeding before a magistrate, in which one Adams was accused of crime, and arrested by order of the magistrate, in anticipation of a requisition from the Governor of Pennsylvania, and the issue of a warrant for his arrest by the Governor of Delaware. Chief Justice Booth, upon the hearing of this case on a writ of *habeas corpus*, held that a judge or justice of the peace has power to order the arrest of a fugitive from the justice of another State, before the demand for his delivery, and also that the acts charged against Adams did not constitute the crime of larceny, but were merely a breach of trust, and on this ground he discharged him from the arrest.

Adams was immediately arrested again, in reference to the same acts, by a warrant of the Governor of Delaware, issued upon the requisition of the Governor of Pennsylvania, and delivered to Edmund Schlemm, as the agent of the latter State. He sued out a second writ of *habeas corpus* ; and this brought the case again before Chief Justice Booth, in *The State v. Schlemm*. In regard to the case, as thus presented, the Chief Justice said :

“If the return of the *habeas corpus* sets forth that the party is a fugitive from justice, that he was demanded as such, and was arrested and committed for the purpose of being surrendered, the only inquiry is, whether the provisions of the act of Congress of 1793 have been complied with. If the fact is shown by the return, and by the warrant of the executive authority under which the fugitive has been arrested, it constitutes a just and legal cause for his imprisonment and detention. The right and power under the Constitution of the United States, and the first section of the act of Congress of 1793, to demand, arrest, commit and surrender fugitives from justice, are exclusively vested in, and confided to, the executive authority of the State from which the fugitive has escaped, and that of the State where he has taken refuge. To authorize the latter to take cognizance of

the case, and to perform the duty imposed upon him, the act of Congress prescribes :

“ 1st. That the demand shall be made by the executive of the State from which the fugitive has fled.”

“ 2d. That a copy of an indictment found, or of an affidavit made before a magistrate charging the person demanded with having committed a crime, shall be produced with the demand.”

“ 3d. That such copy of the indictment or affidavit shall be certified as authentic by the executive of the State from which the person so charged has fled.”

“ These matters are intrusted to the judgment of the executive upon whom the demand is made; and if his mind is fully satisfied in regard to them, the act of Congress makes it his imperative duty to cause the fugitive to be arrested, and delivered up to the regularly constituted agent of the State from which he fled. The warrant of the executive under the great seal of the State, reciting the facts necessary, under the act of Congress, to give him jurisdiction of the case, would, in my opinion, at the hearing of the *habeas corpus*, be conclusive evidence of the existence of these facts, of his judgment in relation to them, and of a compliance with the Constitution of the United States and of the acts of Congress. No investigation therefore in such a case can be made beyond the warrant of the executive, and no examination into the facts and circumstances of the alleged offense, with which the party stands charged.”

Applying these principles to the case before him, the Chief Justice still further said :

“ In the present case, the return fully sets forth copies of all the documents transmitted by the Governor of Pennsylvania to the executive of this State, with the warrant of the latter and the appointment of Schlemm as the agent of Pennsylvania, to receive the prisoner as a fugitive from justice and carry him to that State. It appears that all the requisites of the act of Congress have been complied with. No suggestions or exceptions have been made to the return. It is therefore admitted to be true. And although my belief is that the alleged offense with which the prisoner is charged is the same which, upon the examination of witnesses at the hearing of the former *habeas corpus*, clearly appeared to be a breach of trust, and not a larceny, he must be remanded because the return in this case is conclusive.”

Adams, being remanded, was taken to Pennsylvania, and there on *habeas corpus*, and after an examination into the facts of the case, was discharged on the ground that the facts did not constitute a larceny, but amounted merely to a breach of trust.

The extradition of Adams in this case was clearly not in pursuance of the Constitution and the law. He was not really charged with any crime; and when crime is not charged there is no case for extradition, however regular the papers may be in other respects. It is difficult to see why Chief Justice Booth having discharged Adams in *The State v. Buzine*, because no crime was charged, should not also for the same reason have discharged him in *The State v. Schlemm*. The reason was just as good in the latter case as it was in the former.

It is true that the first arrest was by the warrant of a magistrate, and the second was by the warrant of the Governor of Delaware; and yet the subject-matter on which both arrests were founded was the same in both cases, and in neither case was a crime really charged. The two decisions of Chief Justice Booth are inconsistent with each other, unless we assume that neither the Governor of a State on whom a demand is made, nor a court in hearing a case on *habeas corpus*, when a party has been arrested under the warrant of the Governor, with all the papers before it, is to pass judgment at all upon the question whether a crime has been charged.

This assumption is not correct. It is not true that the question whether a crime is charged belongs exclusively to the authorities of the demanding State or Territory. It belongs equally to the State or Territory asked to make the delivery, since the charge of crime is one of the grounds of the obligation of delivery. It is, hence, necessary, in making the charge, to set forth the substantial facts that constitute the crime, in order that the Governor to whom the demand is addressed may have some means of judging whether a *prima facie* case of crime has been presented to him in the indictment or affidavit. There is no other way of making a legal charge of crime; and it is only from such a recital of facts in the charge that a Governor, asked to make the delivery, can determine whether he ought to issue a warrant of arrest and surrender, or a court, on *habeas corpus*, can determine whether the warrant, if issued, is lawful. If Chief Justice Booth was right in discharging Adams in *The State v. Buzine*, then he was wrong in remanding him to custody in *The State v. Schlemm*.

2. *Ex parte Joseph Smith*, 3 McLean, 121.—This case

came before the Circuit Court of the United States, on a petition for a writ of *habeas corpus* in behalf of Smith, who claimed that he was unlawfully restrained of his liberty by an arrest under a warrant issued by the Governor of Illinois upon a requisition from the Governor of Missouri. Copies of all the papers were in the return to the writ presented to the court.

The charge of crime consisted in a copy of an affidavit made by Lilburn W. Boggs before a magistrate in Missouri, which read as follows :

“This day personally appeared before me, Samuel Weston, a justice of the peace within and for the county of Jackson, the subscriber, Lilburn W. Boggs, who, being duly sworn, doth depose and say that, on the night of the 6th day of May, 1842, while sitting in his dwelling in the town of Independence, in the county of Jackson, he was shot with intent to kill, and that his life was despaired of for several months; and that he believes, and has good reason to believe, from evidence and information now in his possession, that Joseph Smith, commonly called the Mormon Prophet, was accessory before the fact of the intended murder, and that said Joseph Smith is a citizen or resident of the State of Illinois; and that the said deponent hereby applies to the Governor of the State of Missouri, to make a demand on the Governor of Illinois to deliver the said Joseph Smith, commonly called the Mormon Prophet, to some person authorized to receive and convey him to the State and county aforesaid, there to be dealt with according to law.”

The Governor of Missouri, on the basis of this affidavit, issued his requisition for the delivery of Smith, and therein described him as “a fugitive from justice;” and on the same basis, together with the requisition, the Governor of Illinois issued his warrant for the arrest and delivery of Smith to the agent of the Governor of Missouri.

The court, upon hearing the case on the return to the writ of *habeas corpus*, discharged the prisoner on the ground that the affidavit was not sufficient to justify the warrant of arrest. The affidavit was not positive, but merely expressed the belief of Boggs, and that belief related to a conclusion of law. It did not really charge a crime as having been committed by Smith in the State of Missouri, or show that he was in the State of Missouri at the time of the alleged offense, or had fled therefrom. The court

heard affidavits to show that Smith was not in the State of Missouri at the time of the offense charged against him, but did not pass upon the question of their admissibility, and discharged the prisoner on the ground of the insufficiency of the affidavit of Boggs.

"The warrant of the Governor of Illinois," said the court, "recites facts which do not appear in the affidavit. The court can only regard the facts set forth in the affidavit of Boggs as having any legal existence. The mis-recitals and over-statements in the requisition and the warrant are not supported by oath, and cannot be received as evidence to deprive a citizen of his liberty, and transport him to a foreign State for trial. For these reasons Smith must be discharged."

It deserves to be noticed that in this case all the papers were before the court, and that the court claimed and exercised the right to examine these papers, including the charge of crime, and, in the light thereof, to judge and determine whether the warrant of the Governor of Illinois was a sufficient justification for the arrest and detention of Smith. How the court would have ruled, if nothing but the warrant of arrest had been before it, does not appear in the case. It does, however, appear that the warrant itself is not sufficient if, with the other papers before the court, it is not sustained by these papers.

The mere fact that the Governor of Missouri in his requisition, and also the Governor of Illinois in his warrant of arrest, called Smith a fugitive from justice, was not by the court regarded as legal proof that he was such, when the affidavit of Boggs, which was the basis on which both Governors proceeded, furnished no evidence, either that Smith had been in Missouri, or that he had fled therefrom.

**3. Ex parte Thornton, 9 Texas, 635.** — Thornton was discharged by the court on the ground that it did not appear from the warrant of arrest issued by the Governor of Texas, on the requisition of the Governor of Arkansas, that a certified copy of an indictment or affidavit, charging him with crime, had ever been presented to the former Governor.

The Governor of Texas, so far as appeared in his warrant, had acted simply "on the representations of the executive of the

State of Arkansas, to the effect that the relator stood charged with the crime of forgery in that State." "These," said the court, "were altogether insufficient to give the Governor jurisdiction in the case. The representations of the executive of the demanding State are of no effect unless supported by a duly authenticated copy of the indictment found or the affidavit made. These are prerequisites to the issue of the warrant; and without these it is void and gives no authority to arrest and detain the person alleged to be charged."

There can be no question as to the correctness of the ruling in this case. The law of Congress makes the certified copy of the indictment or affidavit, charging the crime, an indispensable condition to the obligation of delivery, and, consequently, to the issue of the warrant of arrest.

**4. Jackson's Case, 2 Flap. 183.** — This case was considered by Judge Withey, of the District Court of the United States for the Western District of Michigan. The judge remarked that "the right to hold the relator depends wholly upon the sufficiency of the warrant of extradition on its face, and nothing else, and with our present views we should not be disposed to look behind the warrant;" and then, having stated the recitals of the warrant, he proceeded to say that "the warrant does not state that it has been satisfactorily shown to the Governor of Michigan that Jackson has fled from the State of Massachusetts or from justice."

As to this omission in the warrant, the judge further said :

"Had the Governor of Michigan stated in his warrant that it had been satisfactorily shown to him that Jackson had fled from justice, or was a fugitive from justice, from Massachusetts, such statement would be *prima facie* sufficient and probably conclusive. There are judgments which seem to be well considered, holding the warrant would, if *prima facie* sufficient, be conclusive, and that courts will not go behind it in such cases. But it is manifest, if the warrant fails to recite or state any conclusion of the executive issuing it that the person charged has fled, and recites only that the demanding Governor has so represented, that the warrant is not legally sufficient to authorize the arrest and extradition. It is a common principle that a process of arrest must be legally sufficient on its face. We are called upon to say whether this warrant of extradition is *prima facie* sufficient under the Constitution and laws of Congress, and we are of opinion that it is not."

The objection, made by Judge Withey to the warrant of the Governor of Michigan in this case, consisted in the fact that the Governor had not formally stated in the warrant that it had been satisfactorily shown to him that Jackson was a fugitive from justice. The general recitals of the warrant did not set forth all the conditions specified in the Constitution and the law; and for this reason the judge held that it was not sufficient on its face to authorize the arrest and detention of Jackson.

The question whether the accused party is a fugitive from justice or not, is jurisdictional, and the fact that he is such must be shown to the Governor by legal evidence before he issues his warrant of arrest, and the warrant itself must declare that the fact has been thus shown. A failure in the warrant to make this declaration is, according to the ruling in this case, fatal to its validity. The mere fact that a warrant has been issued will not be taken as proof that the party is a fugitive from justice; and so the certificate of the demanding Governor, according to Judge Withey, is not legal evidence of this fact. The party must be shown by "sworn evidence, such as will authorize a warrant of arrest in any other case," to be a fugitive from justice, and unless this is thus shown, there is no authority for his arrest. If it is shown to the satisfaction of the Governor, then he must so state in the warrant of extradition. Such is the doctrine of this case.

Whether the party, in a proceeding on *habeas corpus*, would be entitled to contradict and disprove, by parol evidence, such a statement on the part of the Governor, is a point that was not considered in this case. It has been held, in other cases that will appear in the sequel, that the accused party has this right.

**5. Kingsbury's Case, 106 Mass. 223.** — The legal doctrines stated in the syllabus of this case are the following:

(1.) That the issue of a warrant by the Governor, under the Gen. Stats., ch. 177, § 3, for the surrender of a fugitive from the justice of another State, upon the demand of the Governor thereof, is conclusive that the demand is conformable to law and ought to be complied with, unless there is some defect apparent on the record.

(2.) That the certificate of the Governor of another State in demanding of the Governor of this Commonwealth to surrender a



fugitive from justice, that a copy, produced with the demand, of a complaint made on oath to a person styled a trial justice of the peace in said State, charging the fugitive with crime, is authentic, sufficiently authenticates the capacity of the person as a magistrate authorized to receive the complaint, within both the U. S. St. of 1793, ch. 7, § 1, and Gen. Stats., ch. 177, § 1.

(3.) That it is not necessary that the sworn evidence required by the Gen. Stats., ch. 177, § 1, to accompany the demand of the Governor of another State on the Governor of this Commonwealth for the surrender of a fugitive from justice, should be annexed to the demand.

(4.) That a warrant issued by the Governor, under Gen. Stats., ch. 177, § 3, for the surrender of a fugitive from the justice of another State, which recites generally the requisition for the surrender, and that it is conformable to law and ought to be complied with, is sufficient without a further recital of facts on which it is founded.

The court, in this case, recognized the validity of the extradition law of Massachusetts as a guide to the Governor in the surrender of fugitive criminals. The "sworn evidence," required by this law and referred to by the court relates to the question whether the party charged with crime is a fugitive from justice. This evidence must accompany the demand, though it need not be physically annexed to it. The certificate of the demanding Governor is conclusive as to the authenticity of the complaint when this is the form of charging the crime; and the warrant of the delivering Governor, if it generally recites the facts set forth in the requisition, and if the record before the court shows no defect in this warrant or in the recitals thereof, is also conclusive as to the lawfulness of the arrest. Such is the substance of the legal doctrines involved in this case.

**6. Brown's Case, 112 Mass. 409.** The ruling of the court in this case was as follows:

(1.) That the term "other crime," used in the provisions of the Constitution and laws of the United States and the statutes of the Commonwealth of Massachusetts, relative to the surrender of fugitives from justice, means any offense indictable by the laws of the demanding State.

(2.) That a statement, in the warrant of the Governor of this Commonwealth for the arrest and delivery of an alleged fugitive, that the fugitive is "charged with the crime of selling and furnishing intoxicating liquors contrary to the laws of Vermont, and represented to be a fugitive from the justice of said State of Vermont," shows that he has been charged with a crime against the laws of that State, and is a sufficient allegation to that effect.

The general doctrine of this case is that the question, whether the acts charged are criminal, is to be determined by the laws of the demanding State or Territory, and not by those of the State or Territory asked to make the delivery.

**7. Davis's Case, 122 Mass. 324.** — The court, after referring in this case to the extradition provision of the Constitution, the laws of Congress for its execution, and the statutes of Massachusetts, proceeded to say: "The warrant of the Governor of the Commonwealth is *prima facie* evidence, at least, that all necessary legal prerequisites have been complied with, and, if the previous proceedings appear to be regular, is conclusive evidence of the right to remove the prisoner to the State from which he fled." The authorities cited on this point are, *Commonwealth v. Hall*, 9 Gray, 262; *Kingsbury's Case*, 106 Mass. 223; *Brown's Case*, 112 id. 409; and *Taylor v. Taintor*, 16 Wall. 366.

Davis was charged by indictment with obtaining goods in Vermont by false pretenses; and, having fled from that State to Massachusetts, he was demanded of the latter State by the executive of the former. The Governor of Massachusetts, finding the papers to be regular and in due form, issued his warrant for the arrest and surrender of the accused party; and, in hearing the case on *habeas corpus*, the court held these papers and this warrant to be conclusive as to the right of removing him to the State whose laws he was charged with violating, and remanded him to custody.

To the allegation that the indictment did not show a crime against the laws of Vermont, the court replied: "When an indictment appears to have been returned by a grand jury, and is certified as authentic by the Governor of the other State, and substantially charges a crime, this court cannot, on *habeas corpus*, discharge the prisoner because of formal defects in the indict-

ment ; but the sufficiency of the charge, as a matter of technical pleading, is to be tried and determined in the State in which the indictment was found." This being conclusive against the prisoner, the court omitted to pass upon the question, "whether the warrant of the Governor of this Commonwealth, issued upon the demand and certificate of the Governor of Vermont, would preclude the court from inquiring and determining whether the indictment was defective in substance."

**8. The Matter of Clark, 9 Wend. 212.**—Chief Justice Savage, having referred to the law of Congress on the subject of interstate extradition, said in this case :

"In order therefore to give the Governor of this State jurisdiction in such a case, three things are requisite: 1. The fugitive must be demanded by the executive of the State from which he fled. 2. A copy of the indictment found or an affidavit made before a magistrate charging the fugitive with having committed the crime. 3. Such copy of the indictment or affidavit must be certified as authentic by the executive. If these prerequisites have been complied with, then the warrant of the Governor has properly issued, and the prisoner is legally restrained of his liberty."

Holding that these prerequisites had been complied with in the case before the court, the Chief Justice further said that "the Governor of New York had full power and authority to issue his warrant, to direct Clark to be arrested and delivered over to the agent of the State of Rhode Island."

**9. The People, ex rel. Lawrence, v. Brady, 56 N. Y. 182.**—This case came before the Court of Appeals of the State of New York, on a writ of error to the General Term of the Supreme Court, in the first judicial department, to review the judgment affirming the proceedings before Judge Brady, one of the Judges of the Supreme Court, upon a writ of *habeas corpus*, which proceedings were brought up for review by a writ of *certiorari*, and dismissing the writ of *certiorari*.

The papers upon which the Governor of New York had issued his warrant for the arrest and extradition of Lawrence, on the demand of the Governor of Michigan, were before the court. Judge Andrews, in stating the opinion of the court, said: "The ques-

tion arising in the case, and upon which its determination must, we think, depend, is whether the papers presented to the executive of this State, and upon which the rendition of the relator as a fugitive from justice was demanded, were in form and substance sufficient to authorize the issuing of the executive warrant under which the relator is held." This question being answered in the negative, Lawrence was discharged.

The points considered and determined in this case, as set forth in the syllabus of the opinion delivered by Judge Andrews, are the following:

(1.) Under the Constitution of the United States the obligation of a State to deliver up a fugitive from justice, on demand of the executive authority of another State, arises when the fugitive is charged with crime within the State demanding the surrender and having jurisdiction of the offense. The question of his guilt or innocence is wholly immaterial; but there must be a charge of a violation of the criminal law of the demanding State.

(2.) It is a condition precedent to the obligation to surrender that the executive of the State, upon whom the demand is made, be apprised of the facts upon which the duty depends.

(3.) Where the demand is supported by an affidavit as authorized by the act of Congress of 1793, no less degree of certainty is admissible than is required in an indictment for the same offense. If any distinction exists, the affidavit should be more full and explicit; and the offense should be therein distinctly and plainly charged.

(4.) A requisition from the Governor of Michigan upon the Governor of New York was accompanied by affidavits, in substance, charging the fugitive with confederating with others to cheat and defraud a person of his property by false pretenses and devices, and that the conspirators did obtain the property with intent to cheat and defraud. The false pretenses were not set out, nor the means by which the cheat was to have been and was effected. It was held upon the facts: (a.) That the affidavits were not sufficient to authorize the issuing of the executive warrant. (b.) That they did not necessarily charge a crime, as the thus obtaining property was not, by the common law, in all cases a crime. (c.) That it was not made to appear that the fugitive was guilty of any offense punishable by the laws of Michigan. (d.) That if a con-

spiracy to do a wrongful act affecting the property of another is an offense by the laws of that State, although neither the end nor the means are criminal, that fact should have been shown by the affidavits. (e.) That the court cannot take judicial notice of the law of that State, and in the absence of proof, the presumption is that the courts of that State agree with those of New York in declaring and interpreting the common law.

(5.) It was also held that the fact, that an inferior magistrate of the State of Michigan had issued a warrant of arrest upon the same proof, did not justify the inference that a legal crime was charged in the affidavits.

(6.) The courts have jurisdiction to interfere by writ of *habeas corpus* and to examine the grounds upon which the executive warrant for the apprehension of an alleged fugitive from justice from another State is issued, and, in case the papers are defective and insufficient, to discharge the fugitive.

(7.) Previous adjudications in proceedings by *habeas corpus* are no answer to a new writ where the relator is restrained of his liberty. The decision under one writ, refusing to discharge him, does not bar the issuing of a second writ by another court or officer.

Judge Andrews, after presenting the legal doctrines thus summarized in the syllabus of this case, said: "These considerations lead to a reversal of the order of the General Term, and to the discharge of the relator."

The points, to be specially observed in this case, are these: 1. That the court, having before it the papers upon which the Governor of New York had issued his warrant of arrest, assumed and exercised the right of judicially testing the validity of the warrant by these papers. 2. That the affidavits, by which Lawrence was charged with crime, were by the court held to be fatally defective in that they did not show the acts charged to be criminal under the laws of Michigan, and hence did not supply the legal condition precedent to the right of demand and the obligation of delivery. 3. That the question whether these affidavits did charge a crime or not was not regarded as belonging exclusively to the demanding State, but was treated as one proper for the consideration and determination of the State on which the demand was made.

The ruling in this case is plainly not consistent with that of Chief Justice Booth in *The State v. Schlemm*, 4 Harring. 577. In that case the return to the writ of *habeas corpus*, setting forth the Governor's warrant, was regarded as conclusive of the right to hold the prisoner, even though in the opinion of the court the offense charged was not larceny, but was simply a breach of trust. In this case the fact that a crime was not really charged was deemed fatal to the validity of the Governor's warrant, however regular the proceedings may have been in other respects. The latter is clearly the better view of the law.

**10. The People, ex rel. Draper, v. Pinkerton, 77 N. Y. 245.**

— This case was an appeal from the order of the General Term of the Supreme Court of New York, in the second judicial department, affirming the order of the Special Term which dismissed a writ of *habeas corpus*, and remanding the relator to custody. (17 Hun, 199.)

The return to the writ of *habeas corpus* set forth that the relator was held by virtue of a warrant under the hand and seal of the Governor of the State of New York, a copy of which was annexed and made part of the return, and read as follows:

“ *Whereas*, It has been represented to me by the Governor of the State of Massachusetts, that John Leary, James Brady, James Draper, and James Grier stand charged with the crime of breaking and entering the Northampton National Bank, and stealing the moneys thereof, committed in the county of Hampshire in said State, and have taken refuge in the State of New York, and the said Governor of Massachusetts having in pursuance of the Constitution and laws of the United States demanded of me that I shall cause the said John Leary, James Brady, James Draper, and James Grier to be arrested and delivered to Robert A. Pinkerton, who is duly authorized to receive them into his custody and convey them back to said State of Massachusetts”: and

“ *Whereas*, The said representation and demand are accompanied by a copy of the indictment, whereby the said John Leary, James Brady, James Draper, and James Grier are charged with the said crime, and with having fled from said State, and taken refuge in the State of New York, which is certified by the said Governor of Massachusetts to be duly authenticated, you are therefore required to arrest and secure the said John Leary, James Brady, James Draper, and James Grier, wherever they may be found within the State, and to deliver them into the custody of the said

Robert A. Pinkerton, to be taken back to the State from which they fled, pursuant to the said requisition."

The papers referred to in this warrant were not before the court, and hence the question to be determined was whether the warrant itself, in view of the above recitals of fact, was sufficient authority for the arrest and delivery of James Draper to the agent of Massachusetts. In answer to this question the court said :

"The only material question which seems to be presented in this case, is whether a warrant of the Governor of this State for the arrest of a fugitive from the justice of another State, containing the recital of facts necessary to confer authority under the Constitution and laws of the United States, is a sufficient justification for holding the prisoner when brought up on *habeas corpus*, without producing the papers or evidence on which the Governor acted. We have no doubt that the recitals are to be taken as *prima facie* true at least, and that the return, setting forth the warrant containing such recitals, is sufficient. When the affidavit or indictment, charging the offense, appears either by the return or otherwise, a very different question is presented. This court has held, in the case of an affidavit, that it is competent for the court to examine and determine whether a felony has been legally charged, and if not, to discharge the prisoner. (*The People v. Brady*, 56 N. Y. 182.)"

As to the question whether the warrant is to be deemed conclusive, and whether it is competent for the prisoner to prove that the papers presented to the Governor were defective, the court expressed no opinion, since the question did not arise in this case.

The court sustained the action of the General Term in the disposal of the case in *The People, ex rel. Draper, v. Pinkerton*, 17 Hun, 199. Judge Gilbert delivered the opinion of the General Term, in which the following doctrines were set forth :

(1.) That when a warrant is issued by the Governor for the rendition of a fugitive from justice, the court cannot go behind the warrant and inquire into the truth of the facts recited in it.

(2.) That the Governor, in determining that the act of Congress has been complied with, has no jurisdiction to inquire into the truth of the charges made, or to look outside of the papers to determine whether or not the person demanded is a fugitive from justice.

(3.) That the fact that the person has committed a crime in another State, and that he is found in this State, establishes conclusively that he is a fugitive from justice.

(4.) That where the rendition warrant is accompanied by the papers on which it is issued, the question as to the sufficiency of the papers, as a compliance with the act of Congress, is before the court.

The third of the above propositions was made the subject of special comment in chapter VI of this Part, to which the reader is referred. The doctrine stated by Judge Gilbert will not stand the test of critical examination, and is contrary to the opinion expressed by courts in several well-considered cases.

**11. The People, ex rel. Gordon, v. Donohue, 84 N. Y. 438.**

— This case was removed to the New York Court of Appeals, by a writ of error to the General Term of the Supreme Court of New York, in the first judicial department, for the purpose of reviewing an order of the General Term, affirming an order of Judge Donohue, which dismissed a writ of *habeas corpus* issued in behalf of James Gordon, who was in the custody of an agent of Connecticut, which agent, in his return to the writ, set forth in substance that he held and detained Gordon under a warrant of the Governor of the State of New York, issued upon a requisition of the Governor of Connecticut, which warrant recited the facts as to the requisition and the accompanying papers as the reason for its issue.

The ruling of the court in this case affirms the following propositions:

(1.) That the provision of the Constitution (art. 4, § 2), requiring the surrender on demand of the executive authority of a State, of fugitives from justice charged with "treason, felony or other crime," who are found in another State, and the provision of the United States statutes giving practical effect thereto (§ 5278) embrace every criminal offense and every act forbidden and made punishable by the law of the State where the act was committed.

(2.) That where the papers upon which a warrant of extradition is issued are withheld by the executive, the warrant itself can only be looked to for the evidence that the essential conditions of its



issue have been complied with, and it is sufficient if it recites what the law requires.

(3.) That where, to a writ of *habeas corpus*, a warrant of extradition issued by the Governor of this State was alone returned, which recited a representation by the Governor of Connecticut that the prisoner stood charged with the crime of theft committed in said State, that said Governor has demanded his arrest and extradition, that the demand was accompanied by affidavits, etc., whereby the prisoner is charged with said crime and with having fled from said State, and that such papers were certified by said Governor to be duly authenticated, the warrant fully complied with the statute, and sufficiently established the conditions necessary to its issue, and that it was not necessary to state therein the facts constituting the alleged crime.

Judge Finch, in stating the opinion of the court in this case, said :

"Where the preliminary papers upon which a warrant of extradition has been granted are produced and are before us, it is our right and our duty to examine them, and judge and determine, where our process is invoked, whether they are sufficient, under law, to warrant the extradition. This was done in *The People, ex rel. Lawrence, v. Brady* (56 N. Y. 182), because those papers were before the court. \* \* \* \* Where, however, the papers upon which the warrant is founded are not produced, but are withheld by the executive in the exercise of official discretion and authority, we can look only to the warrant itself and its recitals for the evidence that the essential conditions of its issue have been fulfilled. (*The People, ex rel. Draper, v. Pinkerton*, 77 N. Y. 245.)"

Whether these papers shall be furnished or not, in connection with a return to a writ of *habeas corpus*, and as a part of the return, is a matter for the Governor issuing the warrant to determine in the exercise of his own discretion. He may furnish them or he may decline to do so ; and, in the latter event, the court has no power, by a writ of *certiorari*, to compel their production, and must take the recitals of the warrant in respect to the existence and general contents of the papers as being true. These recitals are conclusive as to the facts set forth, and hence not open to denial in the absence of the papers to which they refer. When, however, the papers are produced before the court, then the recitals of the warrant may be tested by the papers.

If the recitals of the warrant, in the absence of the papers, are not sufficient on their face, or if, when the papers are before the court, they are not sustained by these papers, then in either event the party arrested is entitled to be discharged. It is only when all the conditions of the law are legally shown to have been complied with, that the arrest is to be deemed lawful.

**12. The People, ex rel. Connors, v. Reilly, 11 Hun, 89.** — This case was considered and determined by the General Term of the Supreme Court of New York, in the first judicial department. It came before the court upon a writ of *certiorari* to the Court of Oyer and Terminer of New York city, for the purpose of reviewing an order thereof dismissing a writ of *habeas corpus*. Chief Judge Davis stated the opinion of the court as embraced in the following propositions:

(1.) That one in custody of the sheriff by virtue of a warrant of extradition issued by the Governor directing him to deliver such person to the designated agent of the State making the requisition, is not a "person detained in the common jail of any such county upon a criminal charge," within the meaning of section 27 of chapter 400 of 1847, authorizing the Court of Oyer and Terminer to issue a writ of *habeas corpus*.

(2.) That such court has no power to issue such said writ in the case first mentioned.

3.) That where an officer of this State, having authority so to do, issues a writ in such a case, the warrant of the Governor is not conclusive upon him, but it is his duty, upon the return, to examine the affidavits presented to the Governor, and to determine whether any crime was properly and sufficiently charged therein.

Chief Judge Davis referred to the ruling of the New York Court of Appeals in *The People, ex rel. Lawrence, v. Brady*, 56 N. Y. 182, in support of the third of the above propositions. The language applies where such affidavits are made a part of the return to the writ of *habeas corpus*, and has no application when nothing but the executive warrant is before the court.

**13. The Matter of John Leary, 10 Ben, 197.** — Leary being held by the sheriff of the city and county of New York, in pur-

suance of a warrant issued by the Governor of the State of New York, upon the requisition of the Governor of Massachusetts for his extradition as a fugitive from the justice of the latter State, applied to the District Court of the United States for the Southern District of New York, for a writ of *habeas corpus*.

The writ was allowed, and at the hearing the sheriff in his return to the writ produced the warrant of the Governor of the State of New York as his authority for holding the prisoner in custody. Judge Choate, in his deliverance in this case, laid down the following propositions of law :

(1.) That when the prisoner is held under an extradition warrant of the Governor of a State, which recites that it was issued upon the requisition of the Governor of another State, accompanied by a copy of an indictment for burglary, certified as duly authenticated, the warrant is conclusive evidence that the person named therein stands charged with crime in such other State, within the meaning of the Constitution and section 5278 of the Revised Statutes of the United States.

(2.) That, although the prisoner by his traverse to the return denies that any such charge of crime was made, or that there is any such indictment against him, and craves *oyer* of the same, and demands that the respondent be put to the proof thereof, it is not necessary for the respondent to produce a copy of such indictment or of the requisition of the Governor of the demanding State, and that the prisoner is not entitled to a writ of *certiorari* or other process against the Governor to compel the production of the papers on which the warrant was issued, and that it is not necessary that copies of said papers should be annexed to the warrant, or that a copy of the indictment authenticated in the mode provided by the act of Congress for the authentication of the records of one State to be used in another State (Rev. Stats., § 905), should be produced to the Governor before the issue of the warrant.

(3.) That where the petition for *habeas corpus* and the traverse to the return denied that the prisoner was a fugitive from justice, or the person named in the warrant, and the respondent produced a witness that he attended the session of the grand jury in the county in which by the warrant it appeared that the crime of burglary was charged to have been committed, and that the subject

of inquiry was the said burglary, and that he was sworn as a witness, and that his testimony related to J. L. and others and the meeting of said persons, and that the J. L. referred to in his testimony was the prisoner, and that he procured the warrant from the Governor, this was sufficient evidence, at least *prima facie*, that the prisoner whose name was J. L. was the same person named in the warrant and a fugitive from justice, although the witness on cross-examination testified that he never saw the prisoner in such other State.

(4.) That the word "crime" in the article of the Constitution relating to inter-State extradition and the statute (Rev. Stat., § 5278), includes every act made criminal by the law of the demanding State, whether it was so at common law or not, even though made so by a law subsequent to the adoption of the Constitution and the passage of said act of Congress.

(5.) That on *habeas corpus* the question of the identity of the prisoner with the person named is always open.

These points were considered at large by Judge Choate in his deliverance; and on their basis he remanded the prisoner to the custody of the sheriff, holding that the custody was by lawful authority. The papers on which the Governor of New York had issued his warrant were not before the court; and hence the question was whether the warrant itself, being taken as true, was sufficient in its recitals to justify the arrest and detention of the prisoner. This question was answered in the affirmative.

**14. The Matter of Benjamin W. Briscoe, 51 How. Pr. 422.**—This case arose out of a requisition of the Governor of Georgia, addressed to the Governor of the State of New York, for the arrest and delivery of Briscoe as a fugitive from the justice of the former State.

The papers accompanying the requisition were the following:

1. An affidavit of Perkenson that Briscoe was not in the State of Georgia, but was in the State of New York.
2. A warrant for his arrest issued in Georgia.
3. A return of the deputy sheriff that he was not to be found in Fulton county in Georgia.
4. A copy of the indictment found against him, stating the acts which, according to the laws of Georgia, constituted the crime charged.
5. A certificate of the clerk of the court that the copy was a true

copy. 6. The certificate of the judge of the court that the clerk thus certifying was the clerk of the court. 7. The certificate of the Governor of Georgia that the indictment was duly authenticated.

Judge Westbrook, upon the hearing of this case, held that the Governor of New York had authority, under the law of Congress, to issue his warrant for the arrest and extradition of Briscoe, and hence that the act of the Governor in issuing the warrant was not void for the want of power. He also claimed the right of the court, in a proceeding on *habeas corpus*, to examine into the lawfulness of such action.

Coming to the merits of the case, as presented by the requisition and the accompanying papers, the judge said :

"Briscoe was indicted in the State of Georgia for the fraudulent conversion of property intrusted to him, as a commission merchant, to be sold. As the act of 1793 makes the evidence of the right to demand the fugitive 'the copy of the indictment found,' and such a copy was produced to the Governor of this State, it is unnecessary to examine the question whether or not the alleged offense charged in the indictment is one known to the laws of our State, and if not, whether or not proof should have accompanied the papers showing that it was a crime under the laws of the State of Georgia. In *The Matter of Lawrence* (58 N. Y. 182), before referred to, the Court of Appeals, in demanding evidence that the alleged offense charged in the affidavit was a crime under the laws of Michigan, put it upon the ground that it did not appear that an indictment had been found against the relator, and the fact that an inferior magistrate had issued a warrant of arrest upon the same proof as was presented to the executive of this State, does not justify the inference that a legal crime was charged in the affidavits. As the case before us is directly within the law of Congress, our conclusion is that the indictment produced is sufficient evidence that the party is charged with a crime known to the laws of Georgia, and that no valid exception exists to the order of the Governor upon this ground."

Briscoe, however, at the time the Governor's warrant was issued, was held by the sheriff of the city and county of New York, under an order of arrest in a civil action made by Judge Donohue ; and the sheriff refused to deliver him up to the agent of Georgia. Judge Westbrook, as we have seen in another chapter, declined to discharge him from this arrest, holding that the matter involved

therein must be legally disposed of before the warrant of the Governor could become effective, and also holding that under the laws of New York he had no power to grant a discharge in such a case.

**15. The Matter of Voorhees, 3 Vroom, 141.**—The prisoner, in this case, had been arrested under a warrant issued by the Governor of New Jersey, upon a requisition from the Governor of New Hampshire. The return to the writ of *habeas corpus*, issued on the application of Voorhees, brought before the court the following papers: 1. A copy of the indictment against Voorhees. 2. A copy of the warrant of arrest issued in New Hampshire. 3. A copy of the officer's return that he could not find Voorhees in that State. 4. The requisition of the Governor of New Hampshire. 5. The warrant of the Governor of New Jersey. All these papers were duly certified and authenticated.

Chief Justice Beasley remanded the prisoner to custody, giving an opinion which, as summarized in the syllabus, is as follows:

(1.) The words "other crime," used in the clause of the Constitution relative to fugitives from justice, mean any offense indictable by the laws of the State demanding the surrender.

(2.) If the demand be made in due form, and the requisite documents exhibited, the duty to surrender is not discretionary, but merely ministerial.

(3.) If the copy of the indictment, accompanying the requisition, contain a charge of the commission of a crime against the laws of the State making the demand, the tribunals of the State in which the criminal is found will not consider or pass upon the sufficiency of the indictment as a matter of technical pleading.

(4.) When a person infringes the criminal laws of the State, and departs therefrom, without waiting to abide the consequences of such act, he is a fugitive from justice, within the meaning of the constitutional provision in question.

Chief Justice Beasley held in this case that all the conditions of the right to demand and the obligation to deliver a fugitive criminal, as prescribed by the Constitution and laws of the United States, had been complied with, and for this reason remanded the prisoner to custody.

**16. Wilcox v. Nolze, 34 Ohio St. 520.**— The Supreme Court of Ohio, in this case, laid down the following doctrine:

“The provisions of the Constitution of the United States (article 4, § 2), and the act of Congress (U. S. Rev. Stat., § 5278), which provide for the extradition of those who shall flee from justice, and be found in another State, are confined to persons who are actually, and not merely constructively, present in the demanding State when they commit the acts charged against them; and, in a proceeding on *habeas corpus*, for discharge from arrest on a warrant of extradition issued by a Governor in compliance with the requisition of the Governor of another State, parol evidence is admissible to show that there had been no such actual presence of the accused in the demanding State.”

This ruling rejects altogether the theory of a constructive presence in the demanding State where the alleged offense was committed. The party must have been *actually* there at the time of the offense, in order to bring the case within the intent of the Constitution and the law. And if the question, in a proceeding on *habeas corpus*, arises whether he was there or not, then the doctrine of the court is that parol evidence is admissible to show that he was not there. The court issuing the writ of *habeas corpus* would, according to this ruling, be permitted to look beyond the return to the writ, and hear other evidence on such a question of fact, and if so, then it is difficult to see why the Governor of a State to whom a demand is addressed may not do the same thing. He must be satisfied by legal evidence that the accused party was actually in, and has actually fled from, the demanding State.

Judge Okey, in delivering the opinion of the court in this case, said: “The Governor of a State, in issuing his warrant of extradition, acts in an executive, and not a judicial capacity. He is not permitted to try the question whether the accused is guilty or not guilty. He is not to regard a departure from the prescribed form for making the application, or as to the manner of charging the crime, in any matter not of the substance, and he is not to be controlled by the question whether the offense is or is not a crime in his own State, the inquiry being whether the act is punishable as a crime in the demanding State. Nor have the courts larger powers, in any respect, than the Governor.”

The last point in this statement deserves to be specially noticed.

The courts, in considering a case upon *habeas corpus*, can determine no question of law or fact in respect to the obligation of delivery which the Governors of States have not an equal right to consider and determine in ascertaining whether the obligation exists. On this question one and the same law is the rule for both.

**17. Ex parte Sheldon, 34 Ohio St., 319.**—The legal points determined in this case are the following :

(1.) The certificate of authentication provided for in section 5278 of the Revised Statutes of the United States is not required to be in any particular form, and when the language employed by the demanding executive in the requisition shows the copy of the indictment annexed thereto to be authentic, it is sufficient.

(2.) It is no ground for discharging a fugitive from justice on *habeas corpus*, that the indictment, after charging embezzlement by way of conclusion in the same court, also avers that the defendant committed larceny.

(3.) Where from the authenticated copy of the indictment annexed to the requisition, it appears that the fugitive stands charged in the demanding State with embezzlement, the printed statutes of such State, purporting to be published by its authority, may be received to show that embezzlement is made a crime by the laws of that State.

(4.) After an alleged fugitive from justice has been arrested on an extradition warrant, he will not be discharged on the ground that there was no evidence before the executive issuing the warrant, showing that the fugitive had fled from the demanding State to avoid prosecution.

In respect to the last of these points the prosecuting attorney was shown by the extradition papers to have stated : "That said Sheldon is a fugitive from justice from the said State of Missouri, and he has reason to believe and does believe that the said Sheldon is now in the city of Columbus in Ohio." This averment by the prosecuting attorney in Missouri was held to be *prima facie* evidence that Sheldon had fled from the justice of that State, and sufficient on that point to bring the case within the Constitution and the law.



18. *Work v. Covington*, 34 Ohio St. 64.—The question before the court in this case was whether, when a warrant of extradition has been issued and the party has been arrested and delivered to the agent of the demanding State, but has not been actually removed from the State in which the arrest was made, the Governor of the latter State has power to revoke and cancel the warrant, and thus in effect discharge the prisoner. This question as stated in a previous chapter, was answered in the affirmative.

Judge Okey, in delivering the opinion of the court in this case, took occasion to comment on the powers of Governors, under the Constitution and the law, in extradition cases. He remarked that "it is a mistake to say that, in determining whether a case contemplated in the provision is presented, the Governor upon whom the demand is made is vested with no discretion." He added that "it is unreasonable to suppose that the framers of the Constitution did not foresee, when they vested this necessary but dangerous power in the chief magistrate of a State, that occasion would arise, in the discharge of such duty, for the exercise of judgment and discretion."

"Courts," as the Judge continued to say, "have discharged the fugitive on *habeas corpus*, notwithstanding he was in custody under the warrant of extradition, where the offense charged was not a crime or not punishable by indictment in the demanding State, or was not triable there as of right by a jury, where the accused had never been, in person, within the demanding State, or where the papers on which the demand was made were forgeries, or plainly insufficient in the matter of substance. (*The People v. Brady*, 56 N. Y. 182.) If courts may rightly discharge in such cases, it is manifest a Governor may, for the same cause, withhold his warrant, and if he may withhold his warrant, it seems reasonable that he should have the power to revoke it on the same grounds."

Carrying the judgment and discretion of the Governor beyond these "causes," Judge Okey further said: "No satisfactory reason can be perceived why a Governor should issue or obey a requisition where he is satisfied that the sole object of the party complaining is to enforce the payment of a private claim for money. Such an abuse of power is equivalent to a fraudulent use of it."

There is great force in these observations. It was not the de-

sign of the Constitution that the extradition power should be used for any purpose other than the one which it specifies. Any other use is simply a fraud under the forms of law.

**19. The Case of Hooper, 52 Wis. 699.** — The warrant of the Governor of Wisconsin recited in this case that it had been represented to him by the Governor of Kansas that the party demanded stands "charged with the crime of obtaining illicit connection with a female of good repute under the age of twenty-one years, under a promise of marriage, committed in the county of Labette in said State." It also showed that the requisition of the Governor of Kansas was accompanied by a duly authenticated copy of an information filed in that State against the party, charging him with the offense specified. On the basis of these recitals in the warrant the court held as follows :

(1.) That this is sufficient *prima facie* evidence that the party was charged with a crime under the laws of Kansas, for which he is liable, under section 2, article 4 of the Federal Constitution, to be arrested in this State, and delivered up on demand of the Governor of Kansas.

(2.) That our statute which makes the seduction of an unmarried female of previous chaste character, under a promise of marriage, punishable by imprisonment, defines substantially the offense charged in the warrant; and the presumption is that the laws of Kansas are like our own.

(3.) That it is a sufficient compliance with section 5278 of the Revised Statutes of the United States, that the requisition is accompanied by a copy of an information filed in Kansas, instead of an indictment found or an affidavit made before a magistrate.

It was objected in this case that the charge of crime was made by an information, and not by an indictment or affidavit as specified in the law of Congress. To this Chief Justice Cole replied : "The intent of that law obviously is that the charge of crime must be made in the regular course of judicial proceedings in the form of an information filed by the proper law officer, an indictment, or other action known to the law of the State in which the offense was committed." An information is, in certain cases, the legal equivalent of an indictment.

**20. Ex parte Swearinger, 13 S. Car. 74.**— The ruling of the court in this case was as follows:

(1.) Whenever the Governor of a State demands of the Governor of another State the body of a person as a fugitive from justice, producing at the same time a copy of an indictment found or an affidavit made, certified to be authentic by the demanding Governor, and showing that the person demanded is charged with the commission of some crime in the State from which he has fled, it is the duty of the Governor upon whom the demand is made to cause the arrest and delivery of the person demanded.

(2.) It cannot be objected to such arrest and delivery that the prosecution was instituted and the affidavit was made by a citizen of this State, in the State where the crime was alleged to have been committed.

(3.) The absence of an affidavit charging the person to be a fugitive from justice is not fatal to the requisition.

(4.) The term "flee from justice," in article 4, section 2 of the Constitution of the United States, includes cases where a citizen of one State commits a crime in another State and then returns to his home.

(5.) Where a prisoner is in the hands of the sheriff under a mandate issued by the Governor of this State in pursuance of a requisition from the Governor of Georgia, and such mandate requires the delivery of the prisoner to the agent of the Governor of Georgia, the prisoner will not be discharged because that mandate contains no order for his arrest.

Chief Justice Willard dissented from the first and third of the above rulings, taking the ground that, in order to make the case specified in the Constitution and the law, it is necessary to show by legal evidence that the accused party is actually a fugitive from justice. No such fact, as he maintained, was shown in this case; and hence a fundamental condition of extradition, as he claimed, was absent. The court, however, proceeded upon the assumption that the denial that the party was a fugitive from justice was setting up a defense in the nature of an *alibi*, going to the merits of the case. This is a mistake. The denial simply calls in question the right to hold the accused party at all, because compliance with all the conditions of such right is not shown. The view of Chief Justice Willard is the better view of the question.

**21. Jones and Atkinson v. Leonard, 50 Iowa, 106.**—The ruling of the court in this case embraced the following particulars: 1. That the determination of the Governor that the sworn evidence, accompanying a requisition, is sufficient to establish the facts upon which the requisition is based, is not conclusive of the matters therein set forth. 2. That a citizen and resident of Iowa who is charged with having been constructively guilty of an offense in another State, upon which a requisition is based, but who never in fact has fled therefrom, is not a fugitive from justice within the meaning of the Constitution.

The latter of these points was considered in the chapter on the "Flight from Justice," where this and other cases are cited with reference to the point.

**22. Nichols v. Cornelius, 7 Ind. 611.**—It appeared from the papers in this case that the Governor of Indiana, upon a requisition from the Governor of Kentucky, issued his warrant for the arrest of Pamela Cornelius, as a fugitive from justice. The warrant stated that a requisition has been made, which set forth that Pamela Cornelius had been indicted, etc., a certified copy of which indictment accompanied the requisition. The warrant directed the accused party to be delivered to James T. Nichols as the duly appointed agent to receive and convey her to Kentucky. Nichols made return to the writ of *habeas corpus*, issued in her behalf, that he held the prisoner by virtue of the warrant of the Governor, producing the same, but did not in the return produce a copy of the indictment found on which the warrant was based.

The court held as follows: 1. That, in making the return to the writ, it was not necessary to produce a copy of the indictment. 2. That the warrant was *prima facie* evidence that the indictment was pending against the prisoner as alleged therein. 3. That the warrant sufficiently showed the agent's authority, without producing any authority from the Governor of Kentucky.

**23. Hartman v. Aveline, 63 Ind. 344.**—The ruling in this case was as follows:

(1.) That section 7 of the act of March 9, 1867 (R. S. 1876, p. 421), in relation to fugitives from justice, expressly authorizes, and neither section 2 of article 4 of the Constitution, nor section 5278 of

the Revised Statutes of the United States forbids, a court of this State to inquire whether or not the person charged is really a fugitive from justice.

(2.) That the mere recitals contained in the requisition of the Governor of another State, for the delivery of an alleged fugitive from justice, are not sufficient of themselves to authorize the arrest and surrender of the alleged fugitive.

(3.) That one who, at and continuously after the alleged time of the commission of a crime by him in another State, has been in this State, is not a fugitive from justice.

**24. Hibler v. The State, 43 Texas, 197.**—Two of the rulings in this case were as follows :

(1.) That a requisition made upon the Governor of Texas by the Governor of a sister State, for the arrest of one claimed as a fugitive from justice, is sufficient authority for the issuance of an order by the Governor of Texas for an arrest, and a prisoner arrested under such circumstances could only obtain relief on *habeas corpus* by showing that the presumption on which the Governor of Texas acted was unfounded in fact.

(2.) That when a copy of an indictment accompanying a requisition upon the Governor of Texas, for one claimed to be a fugitive from justice, is certified as authentic by the Governor who makes the requisition, no further authentication is needed under section 5278 of the Revised Statutes of the United States; and the absence of a seal to the certificate of the clerk of the court in which the indictment purports to have been found, or of a file-mark on the indictment, will not be noticed in this court on *habeas corpus*.

**25. Mohr's Case, 2 Alabama Law Journal, 457.**—The Supreme Court of Alabama laid down the following doctrines in this case :

(1.) No court or judicial officer of a State has jurisdiction to issue a writ of *habeas corpus* for the discharge of a person held under the authority or claim and color of the authority of the United States, by an officer of that Government.

(2.) This principle, and the reasons on which it is founded, have no application where the person applying for the writ is held

in custody by an officer or agent of another State, under the authority of a demand from the Governor thereof, as a fugitive from justice, and a warrant of arrest from the Governor of this State based on that demand. The detaining officer, in such case, is not an officer or agent of the United States, but is an agent of the State whose executive made the demand; and the courts of this State have jurisdiction to inquire into the legality of the imprisonment or detention.

(3.) The statute which provides that, if the return to the writ of *habeas corpus* shows that the petitioner "is in custody for any public offense committed in any other State or Territory, for which by the Constitution and laws of the United States he should be delivered up to the authority of such State or Territory," he should be surrendered (Code, § 4957), is perhaps, merely declaratory of what the law would require in the absence of the statute and does not preclude the petitioner from showing that his case is in fact not within the class of cases intended to be covered by the Constitution and laws of the United States.

(4.) The extradition clause of the Federal Constitution, and the act of Congress designed to carry it into effect (Rev. Stat. U. S., § 5278), have reference only to crimes actually committed within the jurisdiction of the demanding State, and while the authorities do not agree in the exact definition of a "fugitive from justice," within the meaning of these provisions, it is very certain that a person who was not within the bounds of the demanding State at the time of the alleged offense, and has never since been within its jurisdiction, cannot be considered as a fugitive from justice.

(5.) As to what questions can be reviewed by the writ of *habeas corpus*, in cases of extradition, the authorities are not in harmony, but it is well settled that the court or judicial officer has no power to go behind the indictment or affidavit charging the offense, with the view of investigating the question of the prisoner's guilt or innocence, and it is also settled that even where the papers are regular on their face, and make out a *prima facie* case for the Governor's warrant, his warrant is not conclusive as to the fact that the prisoner is a fugitive from justice, but may be contradicted by proof that he was never within the jurisdiction of the demanding State.

Judge Sonnerville, in stating the opinion of the court in this case, while conceding that the certified copy of the indictment or affidavit, by which the charge of crime is made, is, in a proceeding on *habeas corpus*, to be accepted as importing absolute verity and therefore not open to denial, if in fact a crime is really charged, took the broad ground that, in such a proceeding, the question whether the accused party was actually in the demanding State at the time of the alleged offense, and had fled therefrom, was open to inquiry by the court, and that the finding of the Governor upon this point is not necessarily conclusive, but may be disputed and disproved by the prisoner.

The flight from justice, though not any part of the crime charged, is, nevertheless, a jurisdictional fact, and if it be not established by legal evidence, the case contemplated in the Constitution and the law is not made out. Whether it is established or not the court, according to the ruling in this case, may, in a proceeding on *habeas corpus*, consider and determine, unless excluded from the inquiry by statutory regulation.

**26. The Case of In re Doo Woon, 18 Fed. Rep. 898.** — This case came before Judge Deady, of the District Court of the United States for Oregon, on a writ of *habeas corpus* issued in behalf of Doo Woon, who was a Chinaman residing in Oregon, and was in custody by virtue of a warrant of extradition issued by the Governor of Oregon, upon the requisition of the Governor of California for his arrest and delivery as a fugitive from the justice of the latter State.

As to the question of jurisdiction to consider the case, the court having referred to the law of the United States relating to interstate extradition, said: "This is a case arising under the Constitution and laws of the United States, and in which the prisoner is in custody under the order or by color of the authority of the United States, and therefore this court has jurisdiction." It was not claimed by Judge Deady that the jurisdiction is exclusive of a similar jurisdiction by State courts in such cases.

The writ of *habeas corpus* in this case was issued and served on the 11th of December, 1883; and the petition for the writ declared that the warrant of the Governor of Oregon under which Doo Woon was arrested and held was insufficient, for the reason

that it did not appear therefrom that he was charged with any *specific* crime, and did appear that he was only charged with the crime of felony generally. The next day the officer holding him produced his body in court, and by consent was allowed to make his return to the writ on the following day. The return, which was made on the 13th of December, declared that Doo Woon was held under a warrant of the Governor of California, which warrant was dated the 12th of December, and set forth that the prisoner was charged with the crime of feloniously and unlawfully embezzling the property of the party specified to the amount of \$230.

It appeared, on the hearing of the case, that this warrant issued on the 12th of December, referred to in the return, was not the one upon which the caption was made and the prisoner was detained at the time of the service of the writ of *habeas corpus*, that it was issued after such service, and that the warrant under which the prisoner was arrested and detained did not set forth the crime with which he was charged, otherwise than as stated in the petition for the writ. Judge Deady discharged the prisoner from the arrest, holding that, unless the return to the writ of *habeas corpus* shows that the caption and detention are legal at the time of the service of the writ, the prisoner ought to be discharged, and also holding that a return showing a caption and detention upon valid process since such service is not sufficient.

Doo Woon was then immediately arrested on the second warrant issued by the Governor of Oregon; and on the 14th of December a second writ of *habeas corpus* was granted and made returnable forthwith. It was objected, on the hearing, that it did not appear from this warrant that the requisition of the Governor of California was accompanied by a copy of an indictment or affidavit charging the crime, as required by the law of Congress. Judge Deady, on this ground, held the warrant to be illegal and void and discharged the prisoner from the arrest under it.

**27. The State v. Hufford, 28 Iowa, 391.**— The ruling of the court in this case was as follows:

(1.) That chapter 191 of the Revision, providing for the arrest and surrender of fugitives from justice, contemplates that a charge of crime against the person to be arrested and delivered up must



be made in the State where the crime was committed, in the form of an indictment, information, or accusation known to the law of such State, before some court, magistrate, or officer thereof.

(2.) That, in an action on a forfeited bail bond taken by a justice of the peace for the appearance of the accused at a future day, in a proceeding under an information charging him with the commission of a crime, the justice had no jurisdiction in the proceeding, and, consequently, that the bond was invalid, it not being set forth or stated in the information, nor appearing from the evidence, that the defendant was thus charged, in the State where the crime was perpetrated, with the commission of crime.

(3.) That the voluntary execution of the bond for the appearance of the defendant did not estop him from urging want of jurisdiction in the justice, and that the consent of parties will not confer jurisdiction in a criminal proceeding.

In this case the charge of crime was made in Iowa by affidavit before a magistrate, without any charge of crime in the State where the offense was alleged to have been committed, or any demand for the offender from that State; and, under the law of Iowa regulating the subject, the arrest of the party was held to be without jurisdiction, and further held that the bond given for his release from restraint was consequently void and of no legal force, since the justice of the peace had no jurisdiction even to take the bond.

**28. Dows' Case, 18 Penn. St. 37.**—Dows was, by the Governor of Pennsylvania, demanded of the Governor of Michigan, as a fugitive from the justice of the former State. The latter Governor issued his warrant for the arrest and surrender of Dows to the authorities of Pennsylvania. He was not, however, arrested under this warrant, but was seized at Detroit by officers of the steamboat "Ocean," when on board of that boat, and was then carried to Erie in the State of Pennsylvania, and there delivered to the sheriff of Erie county, and thence conveyed to Pittsburg and lodged in jail. The officers of the steamboat at the time of the arrest had no warrant in their hands authorizing the arrest, and the sheriff of Erie county was also without any warrant for holding Dows in custody. The whole proceeding was consequently without any legal authority.

Dows sued out a writ of *habeas corpus* from the Supreme Court of Pennsylvania, claiming a discharge because of the defect in the mode of his original arrest at Detroit. The court, however, held as follows:

"In the case of the escape of a fugitive from justice from this State to Michigan, after having been charged in this State, by indictment, with forgery, his arrest in the latter State without legal authority possessed by those who made it, will not entitle the prisoner to discharge before prosecution, his release not being demanded by the executive of Michigan."

Chief Justice Gibson, in stating the opinion of the court, said that "had the prisoner's release been demanded by the executive of Michigan, we would have been bound to set him at large." There being no such demand, Dows was remanded to custody.

The doctrine of this case is that, where a party has by an unauthorized forcible removal been brought to a State, and is there charged with crime, he will not, in the absence of a demand for his release by the Governor of the State from which he was thus removed, be discharged on *habeas corpus*. The case was not really one of extradition at all under the color of the authority of law. Dows was simply kidnapped, and brought into Pennsylvania; and the court held that this fact of itself was not a sufficient reason for his release, unless the Governor of Michigan interposed in his behalf and demanded his release.

Such a case furnishes no analogy by which to judge of a case in which there has been an extradition under the forms of law, but in which the extradition procedure has not been according to law. The latter case is not kidnapping by unauthorized agents, but simply a case of illegality by the agents of law; and for this illegality the writ of *habeas corpus* would be the proper remedy, as a discharge from custody would be the proper result.

**29. Ex parte Lorraine, 16 Nev. 63.**—It was held in this case that, "to hold a fugitive from justice to await the requisition from the Governor of another State, it must affirmatively appear from the complaint filed before the committing magistrate in this State:

1. That a crime has been committed in the other State.
2. That the accused has been charged in that State with the commission of

such crime. 3. That he has fled from justice and is within this State. (1 Comp. L. 2278-2286.)"

It was further held that "to hold a fugitive from justice, upon the ground that the money taken by him, in committing a robbery, was brought into this State, there must be a complaint charging him with this offense substantially in the language of the statute- (1 Comp. L. 2373.)"

Judge Hawley, in stating the opinion of the court in this case, said: "The complaint upon which the petitioner was arrested, accused him of having committed the crime of robbery in Alpine county, California, on the 28th of February, 1881. The commitment recites the same facts. Neither the complaint, warrant of arrest, nor commitment avers that he is charged with such crime in the State of California. The proceedings, in so far as they are based upon the provisions of the criminal practice act relating to fugitives from justice, are entirely null and void. (*Matter of Edwin Heyward*, 1 Sandf. 701; *Matter of Leland*, 7 Abb. (N. S.) 64; *Matter of Rutter*, id. 68; *State v. Ilufford*, 23 Iowa, 391; *Ex parte White*, 49 Cal. 443.)"

**30. Ex parte Morgan, 20 Fed. Rep. 293.** — This case, on *habeas corpus*, came before the District Court of the United States for the Western District of Arkansas. Morgan was in custody under a warrant of arrest issued by the Governor of Arkansas, in compliance with a requisition made by the principal Chief of the Cherokee Nation of Indians, on the charge of the crime of murder, and sued out a writ of *habeas corpus*, claiming that the warrant for his arrest was without legal authority.

The main point in this case was whether the Governor of Arkansas had any legal authority to order the arrest of Morgan on the basis of the requisition of the Chief of the Cherokee Nation, and his delivery to the agent of such Chief. Judge Parker held that the authority for the arrest and delivery of fugitive criminals, by the executives of States and Territories, is derived from the Constitution of the United States and the law of Congress for carrying the same into effect. The Governor of Arkansas, like the Governors of all the other States, was dependent upon this authority for his power to order the arrest and delivery of fugitive criminals. It was not a matter of comity or public policy, but of

express provision in the Constitution and laws of the United States, and extradition must be effected in conformity therewith.

The Cherokee Nation of Indians, from which the demand came in this instance, as the Judge held, is not a "State" or "Territory" within the meaning of the Constitution or the law of Congress, but simply a part of what is called "Indian Country." Hence, neither the Constitution nor the law of Congress gave to the Governor of Arkansas any authority to comply with the demand of the Chief of the Cherokee Nation for the extradition of Morgan. The warrant of arrest was for this reason illegal, and on this ground mainly Morgan was discharged.

The same principle applies equally to any other Indian tribe or nation. These tribes or nations are not States or Territories in the constitutional and legal sense, and hence inter-State extradition has no application to them, whether in demanding or surrendering fugitive criminals.

**31. Ex parte Erwin, 21 Albany Law Journal, 57.**—The Supreme Court of Texas held in this case that bail is not allowable pending an appeal in extradition proceedings, even when the State constitution provides that all prisoners shall be bailable by sufficient sureties. On this point Judge Clark remarked:

"If an appeal by a party arrested on a warrant of extradition is within the purview of the statute, the law makes no such exception in his favor as to authorize him to go at large pending the action of this court, and in a situation to defy its mandate and to treat its judgment with contempt. The analogies of the law cannot be appealed to in aid of an order allowing bail. The charge being a felony, if a resort to analogy was permissible, and the judge was authorized to consider remanding the applicant as in the nature of a conviction, to follow a just analogy, he should have been committed, pending his appeal."

"Nor can that provision in our bill of rights, which provides that 'all prisoners shall be bailable by sufficient sureties,' be invoked, because, as said by the Supreme Court, by the terms 'all prisoners,' it was not meant to require all prisoners, under all circumstances, to be bailed, but it must refer to a class of prisoners each and all of whom shall be bailed, except as therein provided. (*Ex parte Ezell*, 40 Texas, 451.)"

"This provision in our organic law must be construed with and controlled by that provision in the Constitution of the United States, which is the supreme law of the land, that 'a person charged

in any State with treason, felony, or other crime, who shall flee from justice and be found in another State, shall, on demand of the executive authority of the State from which he fled, be delivered up, to be removed to the State having jurisdiction of the crime. (Const. U. S., art. 4, § 2.)"

"If upon arrest, under a warrant of extradition, bail is allowable, the Federal Constitution is set at naught, and delivery in the State having jurisdiction of the offense would have its price regulated by the amount of the bail bond, where one could be given at all, and a fundamental provision which was intended to apply to all classes of citizens would be restricted to the poor and unfortunate who were not able to furnish bail. Such cannot be the proper construction of the two constitutions."

The theory of this ruling is that, when a party is under arrest as a fugitive from justice, and while extradition proceedings on appeal are pending against him, he cannot be released from the arrest by bail, without putting in peril the execution of the constitutional provision on this subject. Such a release would give him the opportunity to avoid the delivery altogether by flight, and thus put it in his power to defeat the accomplishment of the end prescribed by the Constitution.

### SECTION III.

#### CONCLUSIONS.

The legal doctrines embodied in the preceding list of judicial cases, though not in all respects identical as to the specific questions involved, are, nevertheless, sufficiently uniform, comprehensive and concurrent to establish, by at least a preponderance of authority, the following general conclusions:

1. **The Purpose of Habeas Corpus.** — The sole purpose of the writ of *habeas corpus*, issued upon the application of a person arrested, under a Governor's warrant, as a fugitive from justice, is to ascertain whether the conditions of the obligation of delivery, as prescribed in the Constitution and the law of Congress, have been complied with. The judicial inquiry is limited to the determination of this single question; and with the question whether the party arrested is actually guilty or innocent, it has nothing to do, since this belongs to the judicial authorities of the demanding State.

**2. Disposal of the Case.** — The uniform rule of the courts in the disposal of extradition cases, brought before them on *habeas corpus*, is to remand the parties to custody where it appears that their arrest and detention are in conformity with the Constitution and the law of Congress for its execution. If, on the other hand, the contrary appears, then the rule is to discharge them from custody. Courts apply the Constitution and the law to the facts as presented, and decide accordingly.

**3. The Crime.** — The settled construction of the courts is that the words "treason, felony or other crime," as used in the Constitution and the law of Congress, are intended to embrace all acts made criminal by the laws of the demanding State, whether they are so or not by the laws of the State asked to make the delivery.

**4. The Executive Warrant without the Papers.** — If, as may be the case, the return to the writ of *habeas corpus* presents to the court simply the executive warrant for arrest and delivery, without the papers, or copies thereof, upon which the Governor acted in the issue of such warrant, then the inquiry is whether the general recitals of the warrant are such upon their face as to show jurisdiction on the part of the Governor issuing the warrant.

These recitals must, in order to establish the fact of jurisdiction, show the following things: (1.) That the Governor issuing the warrant has received a demand from the Governor of another State or Territory, for the arrest and delivery of a specified person as a fugitive criminal. (2.) That the agent to whom the delivery was directed to be made was duly appointed by the demanding authority. (3.) That the demand was accompanied by a copy of an indictment, information, or affidavit, certified to be authentic by the demanding executive, and charging the person with crime in the demanding State or Territory. (4.) That satisfactory evidence, either in the indictment, information or affidavit, or otherwise, accompanied the demand, showing that the person charged with crime had fled from the demanding State or Territory and taken refuge in the State or Territory to whose executive authority the demand is addressed.

If, in the absence of the papers upon which the Governor acted,

the recitals of the warrant set forth these facts, then this will constitute a *prima facie* case sufficient for the arrest and delivery of the accused party to the agent appointed to receive him and carry him back to the State or Territory from which he fled. If these recitals do not present such a case, then the prisoner, upon the showing of the warrant, is entitled to be discharged. The fact of his delivery to the agent of another State or Territory does not impair this right. If no agent has as yet been appointed, then, if the recitals in other respects are sufficient, the party may be detained for the period specified by the law of Congress, to await the appointment and appearance of the agent.

**5. The Executive Warrant with the Papers.**—If, as may be and sometimes is the fact, the papers upon which the Governor acted in issuing his warrant, are made a part of the return to the writ of *habeas corpus*, and are hence before the court for examination, then it is within the province of the court to inquire and determine whether these papers are such as, under the Constitution and the law, authorize the issue of the warrant, and to dispose of the case, either by remanding the prisoner or discharging him, according to the result of such inquiry.

These papers, being before the court, are the means of testing the validity of the Governor's warrant, and on this question the court exercises its own judgment as to what the papers show. It is not bound by the judgment of the executive who issued the warrant, or by that of the executive who made the demand, but may on the basis of the papers review both judgments. It may consider and determine the question whether, according to the papers, a crime has been really charged, and whether the charge is sufficiently explicit to be legal in its character, and also the question whether the party is shown to be a fugitive from justice. The whole question of legality is before the court, as it was originally before the Governor who issued the warrant under which the party was arrested and is held.

**6. The Question of Identity.**—The question whether the person arrested is the party named in the demand and the warrant, is always open before the court, and if raised may be determined by hearing evidence relating thereto. The warrant is

no authority for the arrest of any one except this party. If a false arrest has been made, the court will at once, upon adequate proof of the fact, correct the error by discharging the prisoner. A State law, providing that a party, being arrested, shall be brought before a court for identification, before delivery, is not inconsistent with the Constitution or the law of Congress.

**7. The Flight from Justice.**— There can be no merely constructive presence of the party in the State or Territory demanding him, and no merely constructive flight therefrom. If he was not actually there at the time of the alleged offense, and did not actually flee therefrom, then his case will not be the one described in the Constitution and the law.

As to the question whether the accused party is actually a fugitive from justice, the decisions of courts, in respect to the rule to be applied, are not entirely uniform. Some of these decisions assume that if the party is charged with crime in a State, and is found in the State asked to deliver him up, this, without any other evidence, sufficiently proves him to be a fugitive from justice. Other decisions seem to favor the idea that the finding of the Governor on this question of fact, if stated in the warrant of arrest, is conclusive. Still other decisions proceed upon the theory that the party, in a proceeding on *habeas corpus*, may deny that he is a fugitive from justice, or that he was in the demanding State or Territory at the time of the alleged offense, and that the court may hear and consider evidence, outside of the papers, in the settlement of this question of fact.

The last of these views is the one that best accords with right, reason and justice. The question itself is jurisdictional, and the law of Congress, while providing for the manner in which the charge of crime shall be made, and evidently intending that the certified copy of an indictment or affidavit shall be accepted as conclusive in respect to what it contains, makes no provision as to the manner in which the fact that the accused party is a fugitive from justice shall be established. It supplies no rule on this point.

And yet this jurisdictional fact must be established by legal evidence. Has it been established in a given case? This question every Governor must answer in deciding the general ques-



tion whether he has any jurisdiction in the case, and whether it is his duty or not to order an arrest and make a delivery. No good reason can be perceived why a court, in a proceeding on *habeas corpus*, should not consider and determine the same question, and to this end hear evidence when the question is raised, or why the accused party should not be permitted to introduce parol evidence showing that he is not a fugitive from justice. Such was the ruling in several of the preceding cases. There is nothing in the law of Congress that makes the finding of the Governor conclusive on this point, or excludes its consideration by a court when in a proceeding on *habeas corpus*, inquiring into the lawfulness of the arrest and detention.

Such consideration on the part of a court is not an inquiry into the merits of the case as to whether the party is guilty or innocent, but rather an inquiry into the lawfulness of the arrest. If the party is not shown by legal evidence to be a fugitive from justice, then the arrest is not lawful, and whether it is lawful or not, is just the question which is to be decided in a *habeas corpus* proceeding.

Mr. Wharton very properly says on this point : "The prisoner must have been a fugitive. If not, the Governor has no jurisdiction, and on proof that the prisoner was not a fugitive, and had not been in the State from which the requisition issues, there must be a discharge." (Crim. Plead. and Pr., 8th ed., § 35.) It would be unreasonable to deny to the prisoner the privilege of offering such proof, or refuse to consider its evidential value.

Such, then, are the general conclusions derivable from the preceding list of extradition cases. There are minor and special points in these cases in respect to which each case must speak for itself. Taken as a whole, the cases are presented to show the ruling and practice of courts in dealing with the subject of inter-State extradition.

## CHAPTER XI.

## FEDERAL AND STATE HABEAS CORPUS.

The courts of the United States, and those of the several States, alike possess the power of issuing writs of *habeas corpus*, under the regulations, and within the limitations prescribed by law. Is this power, considered with reference to cases of inter-State extradition, exclusive in either class of courts, or may it be concurrently exercised by both? If the latter be the true answer, upon what foundation does the answer rest? These questions will form the subject of inquiry in this chapter.

**1. Federal Habeas Corpus.**—The courts of the United States have on several occasions assumed that their jurisdiction, by *habeas corpus*, extends to cases in which persons, being arrested and detained as fugitives from justice, have applied to them for this method of relief. They have issued such writs, and conducted the appropriate inquiry in respect to the lawfulness of the custody complained of, and discharged or remanded the prisoners, according to the facts as appearing on the hearing. This practice is equivalent to a declaration of their jurisdiction in such cases.

The case of *Ex parte Smith*, 3 McLean, 121, was considered and determined by the Circuit Court of the United States for the District of Illinois, in 1842. The Attorney-General of the State was notified that, on the application of Smith who had been arrested and was held as a fugitive from justice, a writ of *habeas corpus* had been issued by the court. He appeared before the court, and moved for a dismissal of the proceedings, on the ground of two objections to its jurisdiction, the first of which was as follows :

“The arrest and detention of Smith was not under or by color of authority of the United States, or of any officers of the United States, but under and by color of authority of the State of Illinois, by the officers of Illinois.”

The court, in answer to this objection, held that although a statute of Illinois made it the duty of the Governor of that State

to issue his warrant for the arrest of fugitive criminals, upon a proper requisition therefor, this legislation does not in any way affect the power vested in him by the Constitution and laws of the United States, and that the warrant in this case had been issued under and by the authority of the United States. On this point the court remarked :

“ If the Legislature of Illinois intended to make it the duty of the Governor to exercise the power granted by Congress, and no more, the executive would be acting by the authority of the United States. It may be that the legislature, appreciating the importance of the proper execution of those laws, and doubting whether the Governor could be punished for refusing to carry them into effect, deemed it prudent to impose it as a duty, the neglect of which would expose him to impeachment. If it intended more the law is unconstitutional and void.”

The fact that the warrant of arrest was issued by the Governor of a State, and that the State of Illinois had imposed the duty upon its Governor in the circumstances recited, did not, according to this ruling, make it the less true that it was issued under the authority or color of the authority of the United States, or that the prisoner was in custody under color of such authority.

The act of 1793 (1 U. S. Stat. at Large, 302), giving to State Governors this authority, and imposing the duty upon them, was, in *Prigg v. The Commonwealth of Pennsylvania*, 16 Pet. 539, declared to be constitutional by the Supreme Court of the United States. It is true, according to the ruling of the same court in *Kentucky v. Dennison*, 24 How. 66, that the General Government cannot enforce upon State Governors the duty imposed by this act, but this was not regarded, and never has been regarded, as destroying or impairing the validity of the act as a source of authority to issue warrants of extradition. Courts, both State and Federal, and also State Governors, have uniformly treated the act as valid for this purpose. The Governors of States, when discharging the duty which the act assigns to them, are acting under the authority of the United States, and giving effect to a law of Congress. Upon this point there is now no dispute.

Judge Benedict, in *The Matter of Titus*, 8 Ben. 411, held that “ the Governors of States and their agents, in reference to the extradition of fugitives from the justice of a State, were compelled

to rely upon the statutes of the United States for authority to do the things required thereby, and the statutes of the United States, when complied with, afford them justification." On this ground he also held that the court, under section 753 of the Revised Statutes of the United States, had jurisdiction, on the application of Titus who had acted as the agent of a State Governor in an extradition process, to issue a writ of *habeas corpus* for the purpose of inquiring into the cause of the restraint of liberty.

Judge Choate, in *The Matter of John Leary*, 10 Ben. 197, exercised the *habeas corpus* power on the application of Leary, who was held as a fugitive from justice under a warrant issued by the Governor of New York, and holding the warrant to be lawfully issued under the authority given by the laws of the United States, he remanded the prisoner to the custody of the sheriff of the city and county of New York.

Judge Deady, in *In re Doo Woon*, 18 Fed. Rep. 898, and Judge Sawyer, in *In re Robb*, 19 Fed. Rep. 26, exercised the same power. The writ in the first case was issued on the application of a party held as an alleged fugitive from justice, and in the second case it was issued on the application of the agent of the State of Oregon, who had been appointed by the Governor of that State to receive the fugitive and transport him thereto. The doctrine laid down in both cases was that the extradition proceedings were had under the authority of the United States.

Section 753 of the Revised Statutes of the United States designates the classes of cases in which the Federal courts, or any Justice or Judge thereof, may issue writs of *habeas corpus*. One of these classes embraces any case in which the prisoner "is in custody under or by color of the authority of the United States." A party arrested and held under the extradition warrant of the Governor of a State clearly comes within this description, and hence the question whether, in such a case, the authority given by Congress has been exercised in conformity with law, is one which a Federal court, or any Justice or Judge thereof, is expressly empowered, by a proceeding in *habeas corpus*, to consider and determine. The case comes within the jurisdiction of such a court, as defined by statute, and this jurisdiction is not at all affected by the fact that the warrant of arrest is issued by a State Governor, since the authority thus exercised is given to him by a law of

the United States. The party is held "in custody under or by color of the authority of the United States," and this is enough to authorize the issue of the Federal writ of *habeas corpus*.

**2. State Habeas Corpus.** — One class of powers vested in State courts is that of issuing writs of *habeas corpus*, in the cases defined by law. The general principle of State legislation on this subject is that, with certain exceptions expressly stated, any person who is committed, detained, confined, or restrained of his liberty in any State, for any criminal or supposed criminal matter, or under any pretext whatever, may apply to a competent State court for a writ of *habeas corpus*, and may have the legality of such detention or restraint summarily inquired into and determined. This principle is broad enough to include alleged fugitives from justice, who have been arrested and are detained under extradition warrants issued by State Governors, unless such fugitives are excluded from the writ of *habeas corpus* by special statute in particular States, or unless the writ in such cases is exclusively vested in the courts of the United States.

The States have not enacted any such exclusion, though in Pennsylvania the inquiry is limited to the single question of identity. The peculiarity that marks these cases, and distinguishes them from the ordinary cases in which State courts issue the writ of *habeas corpus*, is found in the fact that the party, applying for the writ, is arrested and detained under color of the authority of the United States. It is on this ground, as has been already shown, that Federal courts possess and exercise the *habeas corpus* power in extradition cases. The question then is whether this fact excludes the power of State courts to inquire in these cases, by *habeas corpus*, into the cause of the restraint of liberty.

A case has recently occurred in California which gives special interest to this question. The facts are as follows:

The Governor of Oregon made a requisition upon the Governor of California, for the delivery, as a fugitive from justice, of C. H. Bayley, and appointed W. L. Robb as the agent to receive the fugitive and transport him to the former State. The Governor of California thereupon issued his warrant for the arrest and delivery of Bayley, which, being duly executed, placed him in the legal custody of Robb, the agent of Oregon. Bayley then sued

out a writ of *habeas corpus* from the Superior Court of San Francisco; and to this writ Robb made a return to the effect that he held the prisoner under the authority of the United States, and on this ground declined to produce his body in court. The court denied the sufficiency of the return, and, adjudging Robb to be guilty of contempt, ordered him to be committed to prison until he produced the body of Bayley, or should be legally discharged.

The Superior Court of San Francisco assumed and asserted its jurisdiction to inquire into the lawfulness of the custody in which Bayley was held, and hence its right to enforce obedience to its order. Robb, on the other hand, for the reason assigned in his return, denied this jurisdiction. The denial, if valid in respect to that court, is equally valid in respect to any State court in like circumstances.

Being thus committed for contempt, Robb sued out a writ of *habeas corpus* from the Supreme Court of California; and this court dismissed the writ and remanded the prisoner to custody. Chief Justice Morrison, in stating the opinion of the court, said :

“The only inquiry in this case relates to the power of the court below to compel *the production of the body* of the prisoner before it, so that the cause of his imprisonment and detention can be inquired into, and on this point we have no doubt. It was not the duty of the court issuing the writ, nor was it obliged to accept as true, the return of the party. It was within the jurisdiction of the court, at least, to inquire into the facts of the case, and the alleged cause of detention, and to this end it was proper that the prisoner should be brought into the presence of the court, in obedience to the command of the writ, whereupon the prisoner would have a right to traverse the return. (*People v. Donohue*, 84 N. Y. 438; *People v. Brady*, 56 id., 182; *Norris v. Newton*, 5 McLean, 99; *State v. Schlemm*, 4 Harr. [Del.] 577.) This the petitioner refused to do, and by such refusal was guilty of contempt.” (*In re Robb*, 1 Pac. Rep. 881.)

The Supreme Court of California did not pass directly upon the question whether Bayley was held by Robb under color of authority of the United States, or whether, if he was so held, it was competent for the Superior Court of San Francisco to inquire, by *habeas corpus*, into the lawfulness of the custody. It remanded

Robb to custody, on the ground that it was his duty to bring the body of Bayley into court, and that, for refusing to do so, he was guilty of contempt of court.

Being thus remanded, Robb then sued out a writ of *habeas corpus* from the Circuit Court of the United States for the District of California; and this court held as follows: 1. That where a petition for a writ of *habeas corpus* shows upon its face that the petitioner is held in good faith, as a fugitive from justice, under the claim or color of the authority of the United States, as contained in sections 5278 and 5279 of the Revised Statutes thereof, no State judge or court has jurisdiction to issue the writ. 2. That where the return to the writ, one having been issued, shows this fact, the State judge or court issuing the writ has no jurisdiction to proceed further with the case. 3. That jurisdiction in such cases is exclusively vested in the courts of the United States. (*In re Robb*, 19 Fed. Rep. 26.)

The court, in pursuance of these views discharged Robb from custody, holding that the Superior Court of San Francisco had no jurisdiction in the case, and hence that Robb had not been guilty of contempt in refusing to produce the body of Bayley in court.

Judge Sawyer, in stating the opinion of the court, quoted, as follows, sections 5278 and 5279 of the Revised Statutes of the United States:

“Section 5278. Whenever the executive authority of any State or Territory demands any person, as a fugitive from justice, of the executive authority of any State or Territory to which such person has fled, and produces a copy of an indictment found or an affidavit made before a magistrate of any State or Territory, charging the person demanded with having committed treason, felony, or other crime, certified as authentic by the Governor or Chief Magistrate of the State or Territory from whence the person so charged has fled, it shall be the duty of the executive authority of the State or Territory to which such person has fled to cause him to be arrested and secured, and to cause notice to be given to the executive authority making such demand, or to the agent of such authority appointed to receive the fugitive, and to cause the fugitive to be delivered to such agent when he shall appear.”

“Section 5279. Any agent so appointed who receives the fugitive into his custody shall be empowered to transport him to the

State or Territory from which he has fled. And every person who, by force, sets at liberty or rescues the fugitive from such agent, while so transporting him, shall be fined not more than five hundred dollars, or imprisoned not more than one year."

Having quoted this statute, Judge Sawyer then proceeded to say:

"When the Governor of a State, acting under this statute, upon the demand of the authorities of another State, issues his warrant for the arrest of a party charged with crime, and that party is arrested by any proper officer, and delivered over to the party empowered by the State in which the offense was committed, to be carried to that State and delivered to its proper authorities, we have no doubt that the Governor issuing the warrant, the officer executing it, and the party to whom he is delivered, are acting by virtue and under the authority of the act of Congress, and no other, and *pro hac vice* are officers or agents of the United States."

Having stated the facts of the case as they appeared in the return of Robb to the writ of *habeas corpus* issued by the Superior Court of San Francisco, the Judge further said:

"It appearing to the court that Bayley was in custody under the laws of the United States, the court had no jurisdiction to proceed further, or to require him to produce the body of said prisoner. The court took a different view on this point, adjudged petitioner to be guilty of contempt in declining to produce the body of Bayley, and to be imprisoned until he should comply with the commands of the writ in this particular. If the court, after being informed of the cause of restraint, had jurisdiction and authority to proceed further, and compel the production of the body of Bayley, notwithstanding the facts shown, then the judgment for contempt is lawful, and the petitioner must be remanded, but if it had no authority to proceed and compel the production of the body of Bayley, then it had no power to punish petitioner for contempt, and he could not be in contempt in not producing him, and the authority of the court to proceed is the question to be determined."

Judge Sawyer disposed of this question by citing the cases of *Ableman v. Booth* and *The United States v. Booth*, 21 How. 506, and *Tarble's Case*, 13 Wall. 397, and regarded them as conclusive to the effect that the Superior Court of San Francisco, after being informed by the return of Robb that he held Bayley



under the authority of the United States as contained in the extradition law of Congress, had no jurisdiction to proceed further with the case, and that jurisdiction in all such cases is exclusively vested in the courts of the United States.

This is a result very different from that which State courts have adopted. It is well known that these courts, ever since the enactment of the extradition law of 1793, have, whenever the occasion has called for it, assumed without the slightest hesitation their rightful jurisdiction to issue writs of *habeas corpus*, on the application of persons arrested and held under extradition warrants issued by State Governors under the authority of this law, and to hear and determine such cases, discharging the parties, or remanding them to custody, according to the facts as appearing on the hearing. This they did before the occurrence of the cases cited by Judge Sawyer, and they have continued to do so ever since. It is not to be supposed that they have pursued this course in total ignorance of the ruling of the Supreme Court of the United States in these cases, or with any intention to defy the authority of that court. Their practice conclusively shows that they have not regarded the ruling in these cases as inconsistent with the jurisdiction which they have so often assumed and exercised. This practice upon its face is a direct contradiction of the view taken by Judge Sawyer.

The question then arises whether Judge Sawyer is correct in the conclusion which he draws from the cases cited by him, and this question we proceed to consider. The cited cases were not extradition cases, and if they, nevertheless, establish his conclusions, then they must do so because they are substantially parallel to the case that was pending before him. Is this the fact?

The case of Booth was, in the first instance, that of a person arrested under the warrant of a duly appointed Commissioner of the United States for an offense against the laws of the United States, and under the authority of this warrant held in custody by a duly appointed marshal of the United States, and then discharged from the custody, in a proceeding on *habeas corpus*, by a justice of the Supreme Court of Wisconsin, which discharge was subsequently affirmed by the Supreme Court of that State. The case was, in the second instance, that of a person who, having been indicted by a Federal grand jury, was tried on that indictment

and convicted before a Federal court, then sentenced by that court to imprisonment, and then in a proceeding on *habeas corpus* discharged therefrom by the Supreme Court of Wisconsin. What the Supreme Court of the United States did with this case, in both of these forms, was to reverse the decisions of the Supreme Court of Wisconsin, on the ground, as fully stated in the opinion delivered by Chief Justice Taney, that, Booth being in the custody of an officer of the United States under the authority or color of the authority of the United States, his discharge therefrom by a State Judge or by the Supreme Court of the State was without jurisdiction and therefore unlawful.

The case of Tarble was substantially similar in the principle involved. He was held in custody by a duly appointed recruiting officer of the United States, as an enlisted soldier, and discharged from that custody by a court Commissioner of Dana county in Wisconsin, authorized by the laws of that State to issue writs of *habeas corpus*, and this order was subsequently affirmed by the Supreme Court of the State. This judgment was reversed by the Supreme Court of the United States, on the ground, as stated by Mr. Justice Field, that "a State Judge has no jurisdiction to issue a writ of *habeas corpus* or to continue proceedings under it when issued, for the discharge of a person held under the authority or claim and color of the authority of the United States by an officer of that Government."

Such, in their substantial facts and in what was decided, are the cases cited by Judge Sawyer. The question then is whether these cases are so parallel to a case of inter-State extradition that the doctrine established in respect to the former is equally applicable to the latter. The Judge assumes such a parallelism, and then proceeds to the obvious conclusion.

There can be no doubt that the Governor of a State, in issuing his warrant for the arrest and delivery of a fugitive criminal, upon the demand of the Governor of another State, is acting under the authority or color of the authority of the United States, and consequently, that the arrest and detention are under color of the same authority. The arrest and detention purport to be under the authority of the United States, and the Supreme Court of the United States, in *Prigg v. The Commonwealth of Pennsylvania*, 16 Pet. 539, declared the law of Con-

gress giving to State Governors this authority to be constitutional. It is on this ground that the Federal courts have claimed and exercised jurisdiction in extradition cases. (*Ex parte Smith*, 3 McLean, 121; *The Matter of Titus*, 8 Ben. 411; *The Matter of John Leary*, 10 id. 197; and *In re Doo Woon*, 18 Fed. Rep. 898.) An arrest for extradition is in this respect essentially parallel to the cases cited by Judge Sawyer.

Is it also true that a State Governor in ordering the arrest and delivery of a fugitive criminal, the State sheriff or officer making the arrest, and the agent of the demanding State who receives the fugitive into his custody are *officers of the United States*, and that, in this respect, an extradition case is essentially parallel to the cases cited by Judge Sawyer? He answered this question in the affirmative, saying that they "*pro hac vice* are officers or agents of the United States," without giving any reasons for the opinion.

No significance is to be attached to the phrase "*pro hac vice*," as used in this connection, since neither the Constitution nor the law knows any thing about officers of the United States who are merely such "*pro hac vice*," as distinguished from those who are really officers or agents of the United States. Officers of the United States are not made by any "*pro hac vice*" process. One who is not such an officer in point of fact cannot be made such by the judicial prefix of "*pro hac vice*."

The extradition law of Congress certainly does not, in express terms, make the persons engaged in conducting the process of extradition officers of the United States, or imply that such is their official character. It implies the opposite. It speaks of "the executive authority" of the demanding State, and of "the executive authority" of the State asked to make the delivery, and of "the agent" appointed and commissioned by the former authority to receive the fugitive, and says nothing about the sheriff or other State officer who may be ordered by the Governor to make the arrest. This surely is not a description of an officer or officers of the United States. The forms of expression used do not suggest the idea, and there is nothing in the extradition provision of the Constitution that suggests it.

One of the necessary features of an officer of the United States is an *office* created by a law of the United States, to be held and occupied by a lawful incumbent, to which powers and duties are

attached, and which generally is a source of emolument to the incumbent as a compensation for his services. The extradition law of Congress creates no office of any description, and does not assign the extradition process to any Federal office already established. What it does is to assign the duty of its execution, in the circumstances specified to the Governor of the State to whom a demand is addressed by the Governor of another State, and also to imply that the latter Governor will appoint an agent to receive the fugitive, which agent it empowers to do the work committed to him by the Governor that appointed him for the service. There is here no creation of an office, and certainly not a Federal office.

Another feature of an officer of the United States we have in the fact that he must be appointed to an office by the President, with the advice and consent of the Senate; and if Congress shall so determine by law in respect to "inferior officers" of the United States, the appointment of such an officer may be made by the President alone, by the courts of law, or by the heads of Departments. (Const., art. 3, § 2.) The Constitution knows nothing about an officer of the United States, except as he is appointed to an office of the United States, in this way. It surely will not be claimed that the extradition law of Congress contains any such appointment. It does not purport to do so, and if it did, it would be unconstitutional, since the appointing power is not vested in Congress. Congress may establish offices of the United States by law, but it is not its prerogative to appoint their incumbents.

A third feature marking an officer of the United States is that of responsibility to the United States in respect to the performance of the duties of his office, and of liability to removal therefrom under the regulations of law, and also to prosecution for misdemeanors in office. Does this feature attach to the Governor of a State under the extradition law of Congress, or under any other law enacted by Congress? Far otherwise. The matter of fact is, according to the decision in *Kentucky v. Dennison*, 24 How. 66, that a State Governor may, if he chooses, execute this extradition law, and may, if he chooses, refuse to do so, without any responsibility to the United States in case of refusal, and without any power in the United States to compel him to do otherwise. He is, in this respect, beyond the control of the United States by

any coercive or punitive measure, beyond the reach of a *mandamus* or an impeachment by any agent of the General Government. Whether he shall perform the duty assigned to him by Congress is a question over which Congress cannot by law exercise the least control, and no court of the United States is or can be empowered to control his action by any judicial process. He is, in this respect, as independent of the United States as is the Czar of Russia.

It is not true then, as a matter of fact, that the Governor of a State is, under the extradition law of Congress, an officer of the United States, whether in demanding or delivering up fugitive criminals. He lacks the three fundamental characteristics of such an officer. To call him such is to apply the title to him when the essential meaning is absent, and to make the mere phrase, without the meaning, the basis for a judicial inference, is not a sound process of legal reasoning.

The Supreme Court of the United States, speaking through Mr. Justice Swayne in *Taylor v. Taintor*, 16 Wall. 366, 370, and referring to cases of extradition under the Constitution and the law of Congress, said: In such cases the Governor acts in his official character, and represents the sovereignty of the State in giving efficacy to the Constitution of the United States and the law of Congress. If he refuse, there is no means of compulsion."

The "official character" of the Governor of a State is that of the supreme executive authority of a State, and according to the doctrine here stated, he acts, when executing the extradition provision of the Constitution and the law, not as a Federal agent or officer, but in his official character as Governor, and in so doing, he represents not the sovereignty of the United States, but that of the particular State of which he is Governor, and which acts through him. The manner of the action is regulated by the law of Congress, but the action itself is that of a sovereign State through its chief executive magistrate. This is certainly true in respect to the demanding State, and the Supreme Court of the United States, following the natural and obvious meaning of the law, says that the same is true in respect to the State asked to make the delivery.

*Mohr's Case*, 2 Alabama Law Journal, 457, as it came before the Supreme Court of Alabama, was an application to the court

by Frederick Gentner, as the agent of Pennsylvania, to vacate the order of the Probate Judge who had discharged Alexander Mohr from illegal custody, on his petition for a writ of *habeas corpus*. Mohr, at the time of the discharge, was in the custody of Gentner, under a warrant of arrest issued by the Governor of Alabama, in compliance with a requisition from the Governor of Pennsylvania. It was claimed that the Probate Judge, though authorized to issue writs of *habeas corpus*, had no jurisdiction in this case, because the arrest and detention were under the authority or color of the authority of the United States.

The Supreme Court of the State held otherwise, and refused to grant the application. Judge Somerville, in stating the opinion of the court, said: "The relator, Gentner, in whose custody the prisoner was shown to be, was not an officer or agent of the Federal Government. He was the agent of the State of Pennsylvania, whose executive had empowered him to make the demand upon the executive authority of this State." The fact that Gentner held Mohr in pursuance of the Constitution and laws of the United States did not, in the judgment of the court, make him a Federal officer, or place him beyond the jurisdiction of a State court to inquire, by a proceeding in *habeas corpus*, whether the custody was lawful. This directly contradicts the view of Judge Sawyer in the case of Robb.

Inter-State extradition then, though regulated by Federal law, is a transaction between two independent and sovereign States, considered in their political character, and each State acts through its Governor, and he acts for the State in "his official character" as Governor, and in so acting he "represents the sovereignty" of the State. The process of extradition, so far as actual execution is concerned, is exclusively a matter of State agency, and is made such by the law of Congress. The demand is by a State Governor. The delivery is by a State Governor. The warrant of arrest is issued by such a Governor. The arrest is made by a State officer. The party receiving the fugitive is a State officer deriving his appointment from the demanding Governor. To make this agency a Federal agency is to give it a character which the law does not assign to it, and which it does not possess.

How, it may be asked, can these State officers execute a law of the United States? This question applies only to the Governors

of States, since the other officers involved in the matter derive their authority from them, and are simply their agents; and as to Governors, the proper answer is that Congress, by a law which the Supreme Court of the United States has declared to be constitutional, and which must therefore be taken to be valid for this purpose, has seen fit in this particular case to give them the power to execute a law of the United States. The fact that they possess this power is explained by the law itself, and with the wisdom of the legislation we have nothing to do in this inquiry.

Congress has provided, in respect to the election of Senators of the United States, that "it shall be the duty of the executive of the State from which any Senator has been chosen, to certify his election under the seal of the State to the President of the Senate of the United States," and that the certificate "shall be countersigned by the Secretary of State of the State." (Rev. Stat. §§ 18, 19.) So, also, Congress has provided that the executive of each State shall cause lists of presidential electors of such State to be made and certified, and delivered to them on or before the day of their meeting to cast their votes. (Rev. Stat., § 136.) Here are laws of the United States to be executed by State Governors, and yet nobody has ever supposed that these Governors become Federal officers or act as such in executing these laws. And there is no more reason for adopting this supposition when they execute the extradition law of the United States.

Assuming then that the process of inter-State extradition, though regulated by a law of the United States, and conducted under the authority of that law, is, nevertheless, a process executed by State officers, we see at once that the cases cited by Judge Sawyer are not in this respect parallel to a case of extradition. It may be true, and according to the ruling of the Supreme Court of the United States it is true, that a party in custody under color of the authority of the United States by an officer thereof cannot be reached by a writ of *habeas corpus* issued by a State Judge or a State court. But it does not by any means follow that a party in custody by a State sheriff, as a fugitive criminal, under a warrant issued by a State Governor, cannot be reached by such a writ of *habeas corpus*. The Supreme Court of the United States did not, in the cases cited, affirm any such proposition, and hence

the cases do not prove the conclusion drawn from them by Judge Sawyer. They are not parallel to a case of extradition in one very important particular.

There is, moreover, another important particular in which the cases of Booth and Tarble are not parallel to an extradition case. The Government of the United States was, in the former, actually enforcing its own authority and custody against these parties, prosecuting and punishing the one for crime against the laws of the United States, and holding the other as an enlisted soldier of the United States. It was very properly said by the Supreme Court of the United States that if a State court could, by *habeas corpus*, interfere with this custody and discharge the parties therefrom, then whether the General Government could exercise its constitutional powers, within the States, by its own courts and officers and punish offenses against its laws, would depend upon the judgment and pleasure of State courts. They would have power to arrest the operations of the General Government, by discharging those whom it held in custody. It was with reference to such cases that the Supreme Court of the United States spoke so emphatically against any interference by State courts.

An extradition case, however, is very different in its character. Here the General Government is not seeking to enforce a law of the United States against anybody. It makes no charge, frames no indictment, and holds nobody in custody. It is not in the act of exercising its authority against anybody. It has no relation to the case, except that of having furnished through Congress the law by which the case is to be governed, and it is in this sense, and this only, that the case comes under the authority or color of authority of the United States. A State, and not the General Government, is pursuing the remedy furnished by law. A State, and not the General Government, is asked to exercise its power. If the party be arrested, a State, and not the General Government, holds him in custody. This differs very widely from the cases of Booth and Tarble, in which the General Government was actually exercising its power and through its officers had these parties in custody, and in which a State court claimed the right to interfere with that custody and discharge them therefrom.

Some of the States have passed laws to regulate the action of their respective Governors in both demanding and delivering up



fugitive criminals, and these laws, so far as auxiliary to the law of Congress and not inconsistent therewith, and so far as designed to enforce upon Governors the duty which the law of Congress prescribes, are undoubtedly authoritative rules for their government. Such in several cases they have been held to be by State courts. Now, this State legislation proceeds upon the assumption that State Governors, in executing the extradition law of Congress, are acting in their "official character" as Governors, and not as Federal officers. If they were Federal officers in the discharge of this duty, the legislation would be alike improper and absurd, since State legislatures have nothing to do with the duties of such officers, and no power to prescribe any rules for their observance. But if, as is the fact and as the legislation assumes, they are State officers and acting as such, then the legislation is entirely proper, so far as not inconsistent with the law of Congress.

The simple truth is that a case of inter-State extradition, as it exists under the Constitution and the law, is complex in its character, and needs to be looked at on all sides in order to be fully understood. There is in the case a *Federal* element, consisting in the fact that the party arrested and held, as a fugitive criminal, is so arrested and held, under the authority or color of the authority of the United States. This fact brings the case within the *habeas corpus* jurisdiction of Federal courts, as defined in section 753 of the Revised Statutes of the United States, expressly extending such jurisdiction to any party who "is in custody under or by color of the authority of the United States."

This, however, is not the whole case. There is another side to it. It is just as true that the party arrested and held, as a fugitive criminal, is so arrested and held by State agency and State officers. The moment we come to the execution of the law we leave the Federal sphere and pass into that of the State Governments. The latter administer the law and apply it by their own officers, and through these officers exercise authority in the arrest and detention of fugitive criminals. This fact furnishes a legal ground for the *habeas corpus* jurisdiction of State courts in such cases. If it be true that the arrest is under the color of Federal authority in the sense that this authority furnishes the law, then it is just as true that the arrest is under the color of State authority in the sense that this authority furnishes the entire execution of the law, and

that, too, as completely as it gives effect to any purely State law.

The *habeas corpus* jurisdiction of the Federal courts rests on one ground, and that of State courts rests on another and equally valid ground. State courts have assumed and exercised this jurisdiction for some reason, and there is no legal basis for it except the fact that the restraint of liberty is by State agency acting within the limits of the State. If the agency were purely Federal, and hence the custody purely such, then the jurisdiction would be exclusive in the Federal courts.

The Attorney-General of Illinois, in 1842, in *ex parte Smith*, 3 McLean, 121, reasoning wholly from that side of the question which relates to State agency, claimed that the Circuit Court of the United States had no jurisdiction in the case, because the arrest of Smith was "under and by color of authority of the State of Illinois, by the officers of Illinois," and not "by any officers of the United States." The court, however, asserted and exercised jurisdiction, on the ground of the law of the United States relating to inter-State extradition, and giving authority to State Governors to order such arrests, while it did not deny that a State court might have exercised a similar jurisdiction in the same case, if applied to for this purpose.

Judge Sawyer, on the other hand, reasoning exclusively from the fact that the process of extradition is authorized by a law of Congress, and assuming that the execution of this law is that of a Federal agency, and further assuming that the cases of Booth and Tarble are essentially parallel to an extradition case, completely reverses the theory set up by the Attorney-General of Illinois in the case of Smith, and comes to exactly the opposite conclusion. His doctrine is that State courts have no *habeas corpus* jurisdiction in extradition cases, and that the whole jurisdiction to inquire in such cases into the cause of the restraint of liberty is exclusively vested in the Federal courts.

The opinion of the Attorney-General of Illinois in the case alluded to is contradicted by the well-settled practice of the Federal courts, and the opinion of Judge Sawyer is equally contradicted by the uniform practice of the State courts. Neither view represents the established judicial opinion of this country. The doctrine of concurrent jurisdiction, having its basis in the

complex character of an extradition case, made up in part of a Federal element, and in part of State elements, is the only doctrine that is in harmony with this opinion, or with the practice founded upon it, or with the facts that compose the legal materials of the case.

The argument of Judge Sawyer assumes that State officers, *as such*, cannot administer the laws of the United States, even when authorized to do so by these laws, and that State courts have no jurisdiction in cases dependent upon the Constitution and laws of the United States. This is manifestly a false assumption. Congress has, in repeated instances, empowered State officers to perform acts under the laws of the United States, without any intimation that these officers, in the performance of such acts, are to be regarded as Federal officers. (Rev. Stat. of U. S., §§ 1014, 1750, 1758, 1778, 2181, 3066, 3833, 4522, 4546, 4556-4559, 4606, 5280.) The State officers thus empowered are not appointed by the United States, or removable from office or punishable for any misdemeanor by Federal authority. They are simply State officers, exercising certain powers given to them by Congress.

Nor is it true, as the argument of Judge Sawyer assumes, that the jurisdiction of State courts is excluded from all cases that depend upon the Constitution and laws of the United States, and in which the Federal courts have jurisdiction. Congress has, by special statute, made the latter jurisdiction exclusive in some of these cases, but not in all of them. (Rev. Stat. of U. S., § 711.)

The judiciary act of 1789 (1 U. S. Stat. at Large, 73), in the eleventh section thereof, gave to the Circuit Courts of the United States "original cognizance, concurrent with the courts of the several States, of all suits of a civil nature at common law or in equity, where the matter in dispute exceeds, exclusive of costs, the sum or value of five hundred dollars, and the United States are plaintiffs or petitioners, or an alien is a party, or the suit is between a citizen of the State where it is brought and a citizen of another State." So, also, the first section of the act of March 3, 1875 (18 U. S. Stat. at Large, 470), in five classes of cases, gives original jurisdiction to the Circuit Courts of the United States, "concurrent with the courts of the several States," and hence suits in these cases may be brought in either class of courts.

The fact that an extradition case, by reason of the law that

governs it, involves a Federal element in virtue of which a Federal court may exercise a *habeas corpus* jurisdiction in such a case, by no means justifies the inference that State courts may not exercise a similar jurisdiction in such cases. There is no basis for this inference in the Constitution and laws of the United States, since there are several classes of cases in which the jurisdiction of the two classes of courts is concurrent. We think that extradition cases form one of these classes; and this is the view which is sustained by the practice of both classes of courts. Congress, certainly, has not excluded the *habeas corpus* jurisdiction of State courts in these cases; and if their *habeas corpus* power, as granted and defined by State laws, embraces such cases, then no reason exists, in the Federal cognizance of the same cases, why the power may not be exercised.

It necessarily results from this view that the Circuit Court of the United States for the District of California, in the case of *In re Robb*, discharged the petitioner from a custody to which he was lawfully committed by the order of the Superior Court of San Francisco. The latter court, under the laws of California, had a *habeas corpus* jurisdiction in the case of Bayley; and if so, then it had the right to compel the production of his body by Robb who, within the jurisdiction of the court, held Bayley in custody. This jurisdiction having attached to the case, and being in the process of being exercised, the Circuit Court of the United States had no right to interfere with it, or discharge Robb from a custody which it was enforcing against him for his contempt. In doing so it invaded the rights of the Superior Court of San Francisco, and made it impossible for that court to complete the exercise of a jurisdiction which had lawfully attached to the case.

The case of Robb, subsequently to the preparation of the above argument, was upon a writ of error to the Supreme Court of California, considered by the Supreme Court of the United States. (*Robb v. Connolly*, 111 U. S. 624.)

Mr. Justice Harlan, in delivering the opinion of the court, stated the case, and also the extradition provision of the Constitution, and the provisions of the act of February 12, 1793, 1 U. S. Stat. at Large, 302, as reproduced in sections 5278 and 5279 of the Revised Statutes of the United States. Having stated the principles set forth by the court in *Ableman v. Booth* and *The*

*United States v. Booth*, 21 How. 506, and in *Tarble's Case*, 13 Wall. 397, he then proceeded as follows :

From this review of former decisions, it is clear that the question now presented has never been determined by this court. In *Ableman v. Booth*, the prisoner, as we have seen, was held in custody by an officer of the United States, under a warrant of commitment from a commissioner of a Circuit Court of the United States, for an offense against the laws of the general government. In *United States v. Booth*, he was in custody in pursuance of a judgment of a court of the United States founded upon an indictment, charging him with an offense against the laws of the United States. In *Tarble's Case*, the person whose discharge was sought was held as an enlisted soldier of the army, by an officer of that army acting directly under the Constitution and laws of the United States.

No such questions are here presented, unless it be, as claimed, that the plaintiff in error is, within the principles of former adjudications, an officer of the United States, wielding the authority and executing the power of the nation. We are all of opinion that he was not such an officer, but was and is simply an agent of the State of Oregon, invested with authority to receive, in her behalf, an alleged fugitive from the justice of that State. By the very terms of the statute under which the executive authority of Oregon demanded the arrest and surrender of the fugitive, he is described as the "agent of such authority."

It is true that the executive authority of the State in which the fugitive has taken refuge, is under a duty imposed by the Constitution and laws of the United States, to cause his surrender upon proper demand by the executive authority of the State from which he fled. It is equally true that the authority of the agent of the demanding State to bring the fugitive within its territorial limits, is expressly conferred by the statutes of the United States, and, therefore, while so transporting him, he is, in a certain sense, in the exercise of an authority derived from the United States. But these circumstances do not constitute him an officer of the United States, within the meaning of former decisions. He is not appointed by the United States, and owes no duty to the National Government, for a violation of which he may be punished by its tribunals or removed from office. His authority, in the first instance, comes from the State in which the fugitive stands charged with crime. He is, in every substantial sense, her agent, as well in receiving custody of the fugitive, as in transporting him to the State under whose commission he is acting. What he does, in execution of that authority, is to the end that the violation of the laws of his State may be punished. The fugitive is arrested and transported for an offense against her laws, not for an offense against the United States.

The essential difference, therefore, between the cases heretofore determined and the present one is, that in the former, the judicial authorities of the State claimed and exercised the right, upon *habeas corpus*, to release persons held in custody in pursuance of the judgment of a court of the United States, or by order of a Circuit Court commissioner, or by officers of the United States in execution of their laws; while, in the present case, the person who sued out the writ was in the custody of an agent of another State, charged with an offense against her laws.

Underlying the entire argument in behalf of the plaintiff in error is the idea that the judicial tribunals of the State are excluded altogether from the consideration and determination of questions involving an authority, or a right, privilege, or immunity, derived from the Constitution and the laws of the United States. But this view is not sustained by the statutes defining and regulating the jurisdiction of the courts of the United States. In establishing those courts, Congress has taken care not to exclude the jurisdiction of the State courts from every case to which, by the Constitution, the judicial power of the United States extends. In the judiciary act of 1789 it is declared that the Circuit Courts of the United States shall have original cognizance, "concurrent with the courts of the several States," of all suits of a civil nature, at common law or in equity, involving a certain amount, in which the United States are plaintiffs or petitioners, or an alien is a party, or the suit is between a citizen of the State where the suit is brought and a citizen of another State.

By section 711 of the Revised Statutes of the United States, as amended by the act of February 18, 1875, jurisdiction, exclusive of the courts of the several States, is vested in the courts of the United States of all crimes and offenses cognizable under the authority of the United States; of all suits for penalties and forfeitures incurred under their laws; of all civil causes of admiralty and maritime jurisdiction; of seizures under the laws of the United States, on land or on waters not within admiralty and maritime jurisdiction; of all cases arising under the patent-right or copyright laws of the United States; of all matters and proceedings in bankruptcy; and of all controversies of a civil nature, where a State is a party, except between a State and its citizens, or between a State and citizens or other States or aliens; the jurisdiction of the States remaining unaffected, in all other cases to which the judicial power of the United States may be extended.

And by the act of March 3, 1875, the original jurisdiction of the Circuit Courts of the United States is enlarged so as to embrace all suits of a civil nature, at common law or equity, involving a certain amount, arising under the Constitution, or laws of the United States, or treaties made, or which shall be made, under their authority, or in which the United States are plaintiffs or

petitioners, or in which there shall be a controversy between citizens of different States, or a controversy between citizens of the same State claiming lands under grants of different States, or a controversy between citizens of a State and foreign States, citizens, or subjects. But it is expressly declared that in such cases their jurisdiction is "concurrent with the courts of the several States,"—the jurisdiction of the latter courts being, of course, subject to the right to remove the suit into the proper court of the United States, at the time and in the mode prescribed, and to the appellate power of this court, as established and regulated by the Constitution and laws of the United States. So, that a State court of original jurisdiction, having the parties before it, may, consistently with existing Federal legislation, determine cases at law or in equity, arising under the Constitution or laws of the United States, or involving rights dependent upon such Constitution or law.

Upon the State courts, equally with the courts of the Union, rests the obligation to guard, enforce and protect every right granted or secured by the Constitution of the United States and the laws made in pursuance thereof, whenever those rights are involved in any suit or proceeding before them; for, the Judges of the State courts are required to take an oath to support that Constitution, and they are bound by it, and the laws of the United States, made in pursuance thereof, and all treaties made under their authority, as the supreme law of the land, "any thing in the constitution or laws of any State to the contrary notwithstanding." If they fail therein, and withhold or deny rights, privileges, or immunities secured by the Constitution and laws of the United States, the party aggrieved may bring the case from the highest court of the State in which the question could be decided, to this court for final and conclusive determination.

The recognition, therefore, of the authority of a State court, or of one of its Judges, upon writ of *habeas corpus*, to pass upon the legality of the imprisonment, within the territory of that State, of a person held in custody—otherwise than under the judgment or orders of the judicial tribunals of the United States, or by the order of a commissioner of a Circuit Court, or by officers of the United States acting under their laws—cannot be denied merely because the proceedings involve the determination of rights, privileges, or immunities derived from the nation, or require a construction of the Constitution and laws of the United States. Congress has not undertaken to invest the judicial tribunals of the United States with exclusive jurisdiction of issuing writs of *habeas corpus* in proceedings for the arrest of fugitives from justice and their delivery to the authorities of the State in which they stand charged with crime.

When a demand has been made, in accordance with the Constitution of the United States, by the State from which the fugitive has fled, upon the executive authority of the State in which he is found, that instrument, indeed, makes it the duty of the latter to cause his arrest and surrender to the executive authority of the demanding State, or to the agent of such authority. But if it should appear, upon the face of the warrant issued for the arrest of the fugitive, that such demand was not accompanied or supported by a copy, certified to be authentic, of any indictment found against the accused, or of any affidavit made before a magistrate of the demanding State charging the commission by him of some crime in the latter State, could it be claimed that the arrest of the fugitive would be in pursuance of the acts of Congress, or that the agent of the demanding State had authority from the United States to receive and hold him to be transported to that State?

This question could not be answered in the affirmative, except upon the supposition, not to be indulged, that, so far as the Constitution and the legislation of Congress is concerned, the transporting of a person beyond the limits of the State in which he resides, or happens to be, to another State, depends entirely upon the arbitrary will of the executive authorities of the State demanding and of the State surrendering him. Whether the warrant of arrest, issued by the Governor of California for the arrest of Bayley appeared, upon its face, to be authorized and required by the act of Congress; that is, whether, upon its face, a case was made behind which the State courts or officers could not go, consistently with the Constitution and laws of the United States, are questions upon which it is unnecessary to express an opinion.

What we decide — and the present case requires nothing more — is, that, so far as the Constitution and laws of the United States are concerned, it is competent for the courts of the State of California, or for any of her judges — having power, under her laws, to issue writs of *habeas corpus* — to determine, upon writ of *habeas corpus*, whether the warrant of arrest and the delivery of the fugitive to the agent of the State of Oregon, were in conformity with the statutes of the United States; if so, to remand him to the custody of the agent of Oregon. And, since the alleged fugitive was not, at the time the writ in question issued, in the custody of the United States, by any of their tribunals or officers, the court or judge issuing it did not violate any right, privilege or immunity secured by the Constitution and laws of the United States, in requiring the production of the body of the fugitive upon the hearing of the return to the writ, to the end that he might be discharged if, upon hearing, it was adjudged that his detention was unauthorized by the act of Congress providing for the arrest and surrender of fugitives from justice, or



by the laws of the State in which he was found. The writ was without value or effect unless the body of the accused was produced.

Subject, then, to the exclusive and paramount authority of the national government, by its own judicial tribunals, to determine whether persons held in custody by authority of the courts of the United States, or by the commissioners of such courts, or by officers of the general government, acting under its laws, are so held in conformity with law, the States have the right, by their own courts, or by the judges thereof, to inquire into the grounds upon which any person, within their respective territorial limits, is restrained of his liberty, and to discharge him, if it be ascertained that such restraint is illegal; and this, notwithstanding such illegality may arise from a violation of the Constitution or the laws of the United States.

It is proper to say, that we have not overlooked the recent elaborate opinion of the learned judge of the Circuit Court of the United States for the district of California in *In re Robb*, 19 Fed. Rep. 26. But we have not been able to reach the conclusion announced by him.

For the reasons we have stated, and without considering other questions discussed by counsel, the judgment of the Supreme Court of California must be affirmed.

The Supreme Court of California, whose judgment is here affirmed, held, that "the Superior Court of San Francisco has power to compel the production of the body of a prisoner before it, and has jurisdiction to inquire into the cause of detention," and that "if the party having the prisoner in charge refuse to produce him in obedience to the writ of *habeas corpus*, he is guilty of a contempt of court." (1 Pac. Rep. 881.) This doctrine was held with reference to the case of Bayley, and the refusal of Robb to produce his body before the Superior Court of San Francisco; and the Supreme Court of the United States affirms the correctness of the doctrine, and, in effect, overrules both the decision and the reasoning of Judge Sawyer in *In re Robb*, 19 Fed. Rep. 26.

The new doctrine on this subject adopted by Judge Sawyer, and in defense of which Wm. Alfred Clarke, of the San Francisco bar, has recently published a pamphlet, is thus set aside by the supreme judicial authority of the land.

## CHAPTER XII.

## LIMITATION OF THE JURISDICTION.

The eleven preceding chapters have been devoted to the consideration of the various questions that relate to inter-State extradition, viewed as a process of getting legal possession of a fugitive criminal, and removing him to the State or Territory from which he had fled, and against whose laws he is charged with having committed an offense. This is the object of the process; and when this object has been gained, then the whole work of extradition has been completed.

There remains, however, an important question to be considered; and that question is whether the custody of the party, thus obtained, is, by reason of the manner of obtaining it, limited in the use thereof to the specific purpose set forth in the extradition proceedings, or may be extended to other and different purposes. May this party be put on trial for a crime, committed prior to his extradition, different from the one specified in the demand and delivery? May his coerced presence in the demanding State or Territory be there used for his arrest in a civil action and the enforcement of a debt claim against him? The avowed object of his extradition having been accomplished, is he then entitled to a reasonable opportunity of departure from the State or Territory, if committing no offense therein, before being subjected to any other legal process? In a word, is the jurisdiction to be exercised over him *special* and limited to the purpose for which the custody was gained, or is it *general* and applicable to any purpose known to law?

These are grave questions, and no treatise on the subject of extradition would be at all complete if it omitted to consider them. The same questions substantially arise in cases of international extradition, and were considered in Part I of this treatise. What then is the proper answer to be given to these questions, when the extradition is between the different States of this Union, and is regulated by the Constitution and laws of the United States?

The design of this chapter will be, by an examination of judicial

authorities and of the Constitution of the United States, to ascertain what is the truth in respect to the point stated.

**1. General Rules of Law.**—It is well settled, as a general rule or principle of law, that a person who, being without the jurisdiction of a court, has been brought within it on a criminal charge as a mere pretext for the purpose of proceeding against him in a civil action, cannot be arrested and held in such action at the suit of any party who was concerned in such an abuse of a legal process. The criminal charge in such a case is practically a deception; and the courts have very properly decided that the party or parties to such deceptions shall derive no advantages therefrom. (*Carpenter v. Spooner*, 2 Sandf. 717; *Snelling v. Watrons*, 3 Paige, 314; *Wells v. Gurney*, 8 Barn. & Cresw. 709; *Benninghoff v. Oswell*, 37 How. Pr. 235; *Metcalf v. Clarke*, 41 Barb. 45; *Seavier v. Robinson*, 3 Duer, 622; and *Fay v. Oatley*, 6 Wis. 42.)

The Supreme Court of Illinois, in *Wanzer v. Bright*, 52 Ill. 35, laid down the following doctrine on this subject: 1. That no court will take jurisdiction of a party when it is obtained by fraud: that a defendant is not amenable to process unless he is in, or voluntarily comes within, the territorial jurisdiction of the court: and that even a valid and lawful act cannot be accomplished by such unlawful means as enticing a party by fraud to come within the jurisdiction of the court, so as to subject him to process. 2. That when a party has been fraudulently induced to come within the jurisdiction of a court, so as to render him or his property amenable to its process, he may have his action therefor. 3. That where a party was decoyed from one State into another, for the purpose of his arrest in the latter State, in a civil action, the creditors guilty of such fraudulent conduct and abuse of process, not only could not make them availing for the purpose intended, but were liable to an action at the suit of the party for the illegal arrest and imprisonment.

The fraud in this case consisted in writing a letter which was a mere fabrication, and was designed to decoy the party from another State to Chicago, where, immediately upon his arrival, he was arrested in a civil action. The court held that the creditors who were guilty of this trick, were not only not entitled to derive any

benefit therefrom, but were amenable in an action against them therefor.

The American Law *Record*, vol. 6, p. 644, contains a brief recital of three cases in which the court held that a party, *invited* into the jurisdiction for consultation on business affairs, cannot be served with summons before he has had a reasonable time to depart, after the termination of the business on which he was invited to come within the jurisdiction.

It is a general principle that, where one is compelled by the operation of law to be in a place which is not his ordinary home, the law will protect him for the time being, against all legal processes for his arrest in that place, unless he there commits an offense. It was on this principle that the Supreme Court of Michigan, in *Watson v. The Judge of the Superior Court of Detroit*, 40 Mich. 729, held that an arrest by a State court of a person attending under process of a Federal court is unlawful, whether the Federal court interfered or not.

No sufficient reason can be assigned why these principles of law should not be applied in extradition cases, so as to guard the process against abuse, or diversion from the purpose intended by the Constitution. The use of the process for any other purpose is an abuse. On this point Judge Cooley uses the following strong and emphatic language :

“To obtain the surrender of a man on one charge, and then put him upon trial on another, is a gross abuse of the constitutional compact. We believe it to be a violation also of legal principles. It is a general rule that, where by compulsion of law a man is brought within the jurisdiction for one purpose, his presence shall not be taken advantage of to subject him to legal demands or legal restraints for another purpose. The legal privileges from arrest, when one is in the performance of a legal duty away from his home, rest upon this rule, and they are merely the expressions of reasonable exemption from unfair advantages. The reason of the rule applies to these cases; and it should be held, as it recently has been in Kentucky, that the fugitive surrendered on one charge is exempt from prosecution on any other. He is within the State by compulsion of law upon a single accusation. He has a right to have that disposed of, and then to depart in peace.” (*Princeton Review*, January, 1879, p. 176.)

Courts, as will appear in the sequel, have not always adopted this view; and yet it is the only just and proper view in the

premises, and the only view that is consistent with the letter and intent of the constitutional provision relating to extradition.

**2. Williams v. Bacon, 10 Wend. 636.**— The facts in this case were as follows :

Bacon was brought into the State of New York, as a fugitive from justice, by a requisition of the Governor of the State upon the Governor of Massachusetts. He was tried and acquitted of the charge brought against him ; yet while in the custody of the sheriff and before his trial, he was arrested on five writs of *capias ad respondendum* in actions founded upon contract, and was detained thereon after his acquittal. He sued out a *habeas corpus* and was discharged from custody by a commissioner. While the subject was under advisement before the commissioner who issued the writ of *habeas corpus*, the attorney for the plaintiff in this cause, who had issued one of the five writs upon which the defendant had been arrested, sued out the *capias*, and obtained an order to hold to bail, on which last *capias* the defendant was arrested, after he was set at large under the *habeas corpus*. A motion was then made to set aside the *capias* last issued and the arrest under it.

In regard to this motion, the court, Judge Nelson delivering the opinion, said :

“ It is well settled in England that a person in custody of the marshal or sheriff on a *criminal* charge, before or after conviction, is subject to a *civil* action, if leave of a court or a judge in vacation is first granted. (Chitty's Cr. L. 661; Foster's Cr. L. 61, 2; Todd's Pr. 306; 2 Archb. Pr. 122: 2 New. R. 245.)”

“ The defendant is not within the rule privileging suitors and witnesses from arrest whilst going to, attending at, and returning from court ; for, if so, the rule allowing criminals in custody to be charged in civil actions would not have been established, for the privilege would have been an answer to the suit. It would be unjust and unreasonable to extend the privilege to cases of this kind ; for it must continue, if it exist at all, during the whole period of the criminal custody. It might and would lead to great abuse.”

“ There is no pretense that the criminal proceeding in this case was a mere pretext to bring the defendant within the jurisdiction of the court for the purpose of proceeding against him *civiliter*. The argument of the defendant's counsel in this particular is not supported by the facts of the case. Had such fact appeared, the defendant would have been discharged. As it is, the motion is denied, with costs.”

The ruling in this case is that, if there is no evidence showing that the proceedings in extradition were instituted for the purpose of bringing the party within the jurisdiction of the court in order to proceed against him in a civil action an arrest in such action, one having been made, will not be set aside. If, however, it appears that such was the real object of the extradition proceedings, then the party, if arrested in a civil action, will be discharged therefrom.

The deliverance of Judge Nelson makes no distinction between an ordinary arrest of a party on a criminal charge, already within the jurisdiction of the court, and the case in which a party has been brought within that jurisdiction by the process of extradition. In the latter case the party was demanded by one State of another State, on a specific charge of crime, and on the basis of this charge delivered up that he might be tried for the crime charged. A custody thus obtained differs very materially from that obtained by an ordinary arrest. The action of the delivering State in withdrawing from the accused the right of asylum, and handing him over to another jurisdiction on the charge of a specific crime, and the action of the demanding State in designating the crime for which the custody is sought, raise a question of good faith as between these States that does not exist at all in an ordinary arrest on a criminal charge. The two cases are by no means identical.

3. *Underwood v. Fetter*, 6 N. Y. Leg. Obs. 66. — The defendant in this case was indicted in the city of New York for obtaining goods on false pretenses, and, on a requisition by the Governor of the State of New York, addressed to the Governor of Louisiana, was brought to the city of New York as a fugitive from justice. While on his way from New Orleans, one of the creditors, together with the agent employed by the plaintiff and all the other creditors, went to Baltimore for the purpose of meeting him there, and, if possible, arranging the business matters in controversy between him and his New York creditors.

These parties failed to meet the defendant at Baltimore, as was by them proposed. Being brought to the city of New York, he was admitted to bail on the criminal indictment; and then, on the application of the plaintiff, who was one of these creditors,

he was taken into custody by virtue of a *capias ad respondendum*, and, in default of bail, was committed to prison.

The counsel for the defendant, in the light of these facts, moved for his discharge from this arrest, on his filing common bail. One of the grounds of the motion was "that the plaintiff, having brought the defendant within the jurisdiction of the court by his own procurement on a criminal charge, could not, during his forced residence here, commence civil suits against him," and that the plaintiff should not be allowed "to make the criminal law the instrument for the collection of his debts."

Judge Edwards, who was one of the judges of the Supreme Court and who heard the case at Chambers, granted the motion and discharged the defendant from the arrest upon his filing common bail, provided that he stipulated to bring no action of false imprisonment against the plaintiff for such arrest. The Judge said, "that the plaintiff, having taken criminal proceedings against the defendant, and brought him within this State, should not then be allowed to arrest him upon civil process."

The plaintiff explicitly denied that the object of the extradition proceeding was to secure the opportunity of instituting the civil suit; and yet the Judge laid down this doctrine as applicable to the case, and furnishing a good reason for the discharge, notwithstanding the plaintiff's denial.

**4. Lagrave's Case, 14 Abb. Pr. [N. S.] 333.** — This case, in some of its aspects, has already been considered in Part I. It is recalled for further examination, because some phases of it are pertinent in the present connection.

Lagrave, who had been extradited from France by the procurement of certain creditors in the city of New York, and against whom, on his arrival at that city, some of these creditors instituted civil actions in which he was arrested, was brought, in the first instance, before Judge Fancher, one of the Judges of the Supreme Court of New York, on writs of *habeas corpus* and *certiorari*. The extradition was wrongfully made since the offense charged was not an extradition crime in the treaty between the United States and France. Judge Fancher said in regard to the case:

"It must be conceded that if the creditors, who procured and caused to be served on the relator the orders of arrest in civil actions, are responsible for the seizure of the relator on French soil, and for his extradition to the United States, there has been, according to the principle of several well considered authorities, such an abuse of process as will require the court to set aside the arrest."

After a careful examination of all the facts in the case, the Judge further said :

"The result of these remarks is, that the relator was not legally arrested in the several orders of arrest mentioned in the return ; and so far as he is imprisoned or detained because of them, he is entitled to his discharge."

Lagrange was, however, remanded to custody on the ground of a bench warrant, in which he was declared to be indicted for burglary, a copy of which was annexed to the sheriff's return. The fact that he was forcibly brought within the jurisdiction, as Judge Fancher held, was no ground for discharging him from arrest in a criminal matter, and hence, while discharging him as to the civil actions, the Judge remanded him "to the custody of the sheriff on the warrant issued on the indictment in the General Sessions against him, with directions to take the relator before that court to answer the indictment."

Mr. H. F. Averill, who had not participated in the proceedings which resulted in bringing Lagrange within the jurisdiction, brought a separate action against him, and the summons having been served on him, he made a motion before Judge Daniels to have the same set aside. The Judge, having remarked that the extradition of Lagrange appears to have been fraudulent, proceeded to say : "The law will not sanction fraudulent or wrongful proceedings, and, for this reason, it deprives the party taking them of all the advantages he attempts to derive from them. He cannot avail himself of process that can only be rendered serviceable as a triumph of fraud."

The simple service of a summons upon Lagrange, requiring him to answer the allegations of the creditor, did not, as the Judge held, impose any restraint on his person, and inasmuch as the summons was served in the interest of a creditor who had no



participation in the extradition proceedings, he refused to set the process aside. The opinion concludes as follows:

"In principle, there can be no practical difference between the case of a fugitive brought from a neighboring State under the Constitution and laws of the United States, and one brought from a foreign country under the provisions of treaties. In each the right of freedom to return is precisely the same, and the implied guaranty of that right under the laws is no greater in one case than it is in the other; and as the process served in this action did not interfere with the full and complete exercise of that right by the defendant, and the plaintiff was in no way implicated with the parties improperly securing his return to this country, the previous motion must be denied with costs."

It is true, that in this case the extradition was international, yet the principles of law applied to it by Judge Daniels, hold equally good in inter-State extradition. As remarked by the Judge, there is no practical difference between the two forms of extradition so far as abuse of the process is concerned.

The case of Lagrave was, in *Bacharach v. Lagrave*, appellant, and *Adriance v. Lagrave*, appellant, 4 N. Y. Supreme Court (Thompson and Cook), 215, carried to the General Term of the Supreme Court of New York, and the order of the Special Term refusing to vacate the order of arrest was reversed by the General Term.

The case then, in *Adriance*, appellant, v. *Lagrave*, 59 N. Y. 110, came before the Court of Appeals of the State of New York, and here the order of the General Term was reversed and that of the Special Term affirmed. The doctrine held by the Court of Appeals was that Lagrave though extradited from France on a criminal charge, was subject to arrest, before he could return, on a civil process. Chief Judge Church, after alluding to previous actions, and to the general rule of law which excludes parties concerned in fraudulent extraditions from profiting thereby in bringing civil actions against the accused, said: "But this rule does not apply to persons not concerned in the trick or device by which the party was brought within the jurisdiction of the court."

This, in effect, adopts the view stated by Judge Nelson in *Williams v. Bacon*, *supra*, in application to a case of inter-State extradition.

**5. Compton, Ault & Co. v. Wilder, 7 Amer. Law Record, 212.**—This case originally came before the Superior Court of Cincinnati, and the facts in respect to it are stated by Judge Yaple, as follows:

It appears that D. H. Wilder, upon a requisition of the Governor of Ohio, directed to the Governor of Pennsylvania, was arrested there and brought to Ohio to answer to a criminal charge for an alleged act made indictable and punishable by the laws of Ohio, the alleged offense having consisted in a claim that he had misrepresented his wealth to Compton, Ault & Co., and induced them to become parties to a note for some \$5,000, which they were compelled to pay. For that reason he was brought here. The defendant waived a preliminary examination and was bound over to answer the charge before the grand jury of the county and the Court of Common Pleas, if the grand jury should find a true bill. He gave bond thereupon.

After he had given his bond and was discharged — on the same day — Compton, Ault & Co. brought this suit to recover from Wilder the amount of money they claimed they had lost by reason of his representations. They averred further that the obligation was incurred by his fraudulent acts and misrepresentations. They had an order of arrest issued. Wilder was arrested and summons was served upon him. He files a motion now to have the service of the summons and the service of the order of arrest set aside, and asks that he be discharged.

The arrest was made on the same day he was bound over, and had given bond on the criminal charge, and it appears prior to the time that a through train would start for Corry, Pennsylvania, from Cincinnati, Mr. Wilder being a resident of Corry, Pennsylvania, where he had lived some years.

That motion is resisted. Of course, it is not claimed that a suit cannot be brought and an order of arrest may not be sworn out and prosecuted, provided a valid service can be obtained. But the defendant says a valid service cannot be obtained under the circumstances under which this one was obtained.

It may be remarked that Compton, Ault & Co. were the movers in procuring the requisition and the institution of the criminal charge against Wilder and in having him brought here. It was at their instance that the power of the State of Ohio was invoked, and the Governor of Pennsylvania acted, and in consequence of which Wilder is here.

The Judge, having explained the constitutional provision and the law of Congress relating to the extradition of fugitive criminals, concludes his opinion as follows:

If a stranger, who had nothing to do with these extradition proceedings, had found Wilder on that day here and served him with process and got out a *capias*, whether or not Wilder could have set aside that service, because he had been brought here on a requisition originating from sources with which the plaintiff had nothing to do, we need not determine; nor if he had been tried and acquitted and then these parties should thereafter issue a *capias*, or if he had been arrested for another crime against this State. That is not this case. The case is still broader in behalf of his rights than if he was a mere suitor at court, whether as a voluntary citizen or as a criminal. He is not a citizen of Ohio. He comes here by virtue of a very extraordinary power — the power of the United States, acting through the Executive of the State of Pennsylvania, and one that he cannot resist — and then the party who procures the requisition brings a suit before he has time to return, and the question is whether this defendant can say that that is an abuse of the extradition, and he cannot be held to answer to the claim.

These plaintiffs who got out the requisition say they did it simply for the purpose of the criminal prosecution, and not with any ultimate designs for a civil suit, and it was not until after the bail was given that they formed the intention of bringing a civil suit, and they claim that for that reason they should hold him.

It seems to me that to allow that as valid, even taking it for granted, which I have to do, that it is all true, is opening the door to a very easy abuse of this power. A man may simply be careful not to form or aver any purpose until certain contingencies occur.

I take this to be the rule, that where parties procure the extradition process, and have a party brought into another State on a criminal charge growing out of some of their property or money rights, these parties have no right to institute a civil suit, having its origin in the alleged crime. I think a person who would undertake to sustain process, if it can be done, should have had, at least, no direct or indirect connection with the procuring of the extradition and the bringing of the party to this State to answer, for it comes simply to this, that it would enable a citizen of Cincinnati to extend the area of Ohio's laws beyond the State, and bring the citizen of Pennsylvania into its jurisdiction, and there compel him to respond to civil demands.

We must bear this in mind. Wilder lives in Corry. If he has violated any of the rights of these parties, or owes them any thing, the courts are open there and will administer justice as faithfully as we can do it.

The rule I have indicated will have to be adopted. When criminals are extradited and brought into another State, those who were the cause of having the requisition sued out, directly or in-

directly, are forbidden to institute a civil suit until the party has a reasonable time to return. Of course he would have until the train went out. After viewing this matter in all its consequences, I feel constrained to set aside the service of summons and the service of arrest and to discharge the defendant.

As this action defeats substantially the claim of the plaintiffs, at present, in this court, the case may be taken up on error. There is no question that I should like to see decided by the Supreme Court of the State of Ohio more than this.

The District Court of Hamilton county, in a review of the case upon exceptions taken by the plaintiffs, affirmed the judgment of the Superior Court of Cincinnati; and then the case was carried by writ of error to the Supreme Court of Ohio. (*Compton, Ault & Co. v. D. H. Wilder*, 9 Cincinnati Law Bulletin, 314.)

Judge Nash, in delivering the opinion of the court, gave a brief history of the case, and then proceeded to say:

Wilder had been surrendered by the State of Pennsylvania to be prosecuted by the State of Ohio and in her name for an alleged crime. It was for this purpose alone that the State of Ohio asked his extradition. It was for this purpose alone that the State of Pennsylvania handed one of her citizens over to the officers of Ohio.

This proceeding took place by virtue of that portion of section 2, article 4 of the Constitution of the United States, which provides that a person charged in any State with treason, felony or other crime, who shall flee from justice and be found in another State, shall, on demand of the executive authority of the State from which he fled, be delivered up to be removed to the State having jurisdiction, and by virtue of the laws of the United States, enacted to make this provision of the Constitution effective.

In this case, the machinery was set in motion by Compton, Ault & Co. by the application to the Governor of Ohio. Good faith upon the part of these applicants, and good faith upon the part of Ohio to the surrendering State, demanded that Wilder having been by force brought into Ohio for a specific purpose should not be deprived of any rights except such as he had forfeited by the commission of the alleged crime. He cannot be held to have forfeited any right before conviction. It is claimed that he was indebted to Compton, Ault & Co. If he was, it was his right to be sued in the jurisdiction in which he was domiciled, unless he voluntarily came into the jurisdiction of Ohio.

It was bad faith in Compton, Ault & Co. to commence a civil action and attempt to serve a summons and an order of ar-

rest therein upon Wilder before conviction, and before he had an opportunity to return to his home. It would become bad faith in this State if its courts should make such service effective.

It was a duty made incumbent upon the Governor of Pennsylvania by the Constitution of the United States to surrender Wilder, upon proper application from the Governor of Ohio. But as reflecting upon this question of good faith, it is not irrelevant to look at the legislative enactments of this State upon this subject.

March 25, 1870, the General Assembly adopted a resolution relative to the surrender of persons charged with treason, felony or other crimes (67 Ohio L. 171.) In this resolution it was suggested that in the opinion of the General Assembly, the Governor of Ohio should not make a requisition for an alleged fugitive from justice until clearly satisfied that the requisition is sought in good faith for the punishment of crime and not for the purpose of collecting any debt or pecuniary mulct, or for the purpose of removing the alleged fugitive to a foreign jurisdiction, with a view there to serve him with civil process. It also suggested that the Governor should be in like manner satisfied before issuing his warrant upon a requisition made upon him by any other State for an alleged fugitive.

The rule thus suggested has governed the executive department of the State since 1870. What was formerly a rule of the executive department suggested by the General Assembly became a law controlling the action of the Governor, on the first of January, 1880. (Rev. Stats., § 95.)

By the action of the executive and legislative branches of her government, Ohio has indicated to the other States, her purpose to confine the use of power to extradite persons charged with crime to its sole and proper object.

To secure a service of summons in a civil action like the one we are considering is not one of the objects intended to be accomplished by this grant of power.

In a country like ours, this power is useful and indispensable. It was intended, however, to subserve great public interests. When otherwise used, it becomes an evil.

The temptation to make it subservient to private interests is great. This weapon, intended alone to secure the punishment of crime, is frequently resorted to to enforce the collection of private debts, or to remove a citizen from his home into a foreign jurisdiction that he may there be sued in a civil action.

This growing evil has been seen and appreciated by the chief executives of many States, and to guard against it, rules and regulations are being adopted which may make the extradition of an alleged fugitive in a proper case extremely difficult. It has been

recognized by both the executive and legislative branches of our Government as is shown by their former action.

The judicial should be as swift in putting the seal of condemnation upon this abuse as have been the other branches of the Government. The certain remedy to prevent its growth, is to deprive all persons who participate in the misuse of the power to extradite persons, alleged to be fugitives from justice, of the fruits resulting from such participation.

We approve of the conclusions reached by the Superior Court of Cincinnati and the District Court of Hamilton county, and affirm their judgment.

Judgment accordingly.

Decided May 29, 1883.

The language of the Supreme Court and of the Superior Court of Cincinnati is emphatic in insisting that the extradition remedy, provided by the Constitution and laws of the United States, shall be rigidly confined to the single purpose specified, and that all attempts to make it serve other purposes should be defeated by the action of courts, whenever they have occasion to deal with the subject.

The Supreme Court said "that good faith upon the part of Ohio to the surrendering State demanded that Wilder, having been by force brought into Ohio for a specific purpose, should not be deprived of any rights, except such as he had forfeited by the commission of the alleged crime." Here is a statement of the principle that confines the custody secured by the extradition remedy to the single purpose contemplated in the law, and set forth in the extradition proceedings, and that excludes all other purposes. The application of this principle is demanded by good faith.

#### 6. The Matter of Noyes, 17 Albany Law Journal, 407.—

This case was a proceeding in *habeas corpus* before Judge Nixon, of the District Court of the United States for the District of New Jersey. Noyes had, on the demand of Governor McClellan, of New Jersey, been delivered up, as a fugitive from justice, by Chief Justice Carter of the Supreme Court of the District of Columbia, in the exercise of authority given by Congress. He was charged with the crime of perjury committed in the county of Essex in New Jersey; and it was alleged that he had fled from

the justice of that State and taken refuge in the District of Columbia.

The return to the writ of *habeas corpus* showed that Noyes was in custody, not only upon the indictment for perjury as set forth in the extradition proceedings, but also upon an indictment for conspiracy, which was no part of the charge on which he was demanded and delivered up to the authorities of New Jersey. Judge Nixon, after stating the facts as appearing in the return, and substantially admitted in the traverse to the return, remarked :

“We are thus brought to the consideration of the naked questions: 1. Whether a fugitive from justice, extradited from one State of the Union to another on the charge of the commission of a specific crime, can be held by the courts of the State to which he is sent for trial, for another and different crime? 2. And whether such persons may be detained by the authorities of the State for prosecution, notwithstanding it may appear that their arrest under the rendition proceedings was without legal authority?”

Both of these questions were answered in the affirmative and hence became affirmative propositions. The general ground of the answer, as shown by the authorities cited, was that when a party is actually within the jurisdiction of a court, and there properly charged with crime, the manner in which he came to be there is immaterial, so far as the power of the court to detain and try him is concerned. It is enough that he is within the jurisdiction of the court and there criminally charged. If he has been unlawfully dealt with in being brought there, this will be no reason for not detaining him and trying him for any crime legally charged against him.

The first of the propositions adopted by Judge Nixon declares that a fugitive from justice extradited, under the Constitution and the act of Congress, from one State to another, on the charge of the commission of a specific crime, can be held by the courts of the State to which he was surrendered, for trial for another and different crime. This is equivalent to saying that the extradition of the party, as provided for by the Constitution and the law, has nothing to do with the offense for which, being extradited, he may be tried and punished in the demanding State. He may be there dealt with for the offense charged in the process of

the extradition, or for any other offense, just as if he had not been extradited at all, or had voluntarily come within the jurisdiction, or had never escaped therefrom.

This is the direct opposite of the view stated by Judge Cooley, as previously quoted; and whether it accords with the letter and intent of the Constitution is a question that will be considered in the sequel of this chapter.

The second proposition is that "such persons" — namely, fugitives from justice who have been extradited from one State of the Union to another, on the charge of the commission of specific crimes, but in respect to whom it appears that their arrest under the rendition proceedings was without legal authority — can be detained for prosecution by the authorities of the demanding State. Let it be observed that the persons here described were arrested and delivered up under "rendition proceedings." They were not kidnapped by private parties; they were not decoyed into the jurisdiction of the State; but they were formally demanded by the executive authority of one State and as formally arrested and delivered up by the executive authority of another State.

The peculiarity about these cases, as stated by Judge Nixon, consists in the fact that the "arrest under the rendition proceedings" by which the result was attained, was "without legal authority." These "proceedings," including the arrest, were either wholly or in some respects unlawful. They were not in conformity with the Constitution and the law. This fact, however, according to Judge Nixon, has nothing to do with the right of the demanding State to detain the parties, thus unlawfully arrested and delivered up for prosecution. The State having got possession of them, the question whether the "rendition proceedings" by which the possession was secured, were lawful or not, is a matter of no consequence, so far as the use of that possession is concerned. The possession is just as good for all legal purposes if unlawfully gained, as it would be if lawfully gained.

Let us then suppose that an alleged fugitive from justice, being arrested in one State and delivered to the agent of another State under "rendition proceedings" that in fact were "without legal authority," should, before his actual removal from the former State, sue out a writ of *habeas corpus* to test the lawfulness of



the arrest and delivery, as he would have an unquestionable right to do. Let us further suppose that the court issuing the writ should, upon hearing the case, be of the opinion that the "rendition proceedings" were "without legal authority," and hence that the custody of the prisoner was without such "authority." The plain duty of the court in such a case would be to discharge the prisoner. This has been repeatedly done by courts when, in their judgment, the custody was "without legal authority."

It is difficult to see why the same rule should not be adopted in a *habeas corpus* instituted in the State that has, by unlawful "rendition proceedings," obtained the custody of an alleged fugitive from justice. It has a custody to which, by the very terms of the case, it has no legal right, to which it had no such right when the party was in the hands of the agent in another State, and to which it cannot acquire a right by the mere fact that an unlawful arrest and delivery have actually brought the party within its jurisdiction. If the party would, in the case supposed, be entitled to a discharge on *habeas corpus* in the State from which it was sought to remove him, he certainly does not lose that right by being illegally removed to the State demanding him. He is entitled to the protection as well as subject to the restraint of extradition law.

The question then is whether a State, having by unlawful "rendition proceedings" obtained the custody of a party, shall detain him in virtual violation of the law that provides for giving the custody, especially when but for this violation it would not have had the custody at all. If the States depend on extradition law to get possession of fugitive criminals, as they do and must, then it is but reasonable and just to each other that they should confine themselves to that possession which is secured in conformity with this law, and not take advantage of a custody gained by "rendition proceedings" that were in fact "without legal authority." And whether this is the fact or not, in any given case, is a proper inquiry on *habeas corpus*, either in the State making the arrest and delivery, before the actual removal of the party from its jurisdiction, or in the State making the demand, after such removal.

The lawfulness of the custody secured by extradition proceedings does not cease to be a proper question for consideration on *habeas corpus*, by the mere fact that the custody has been secured,

or by the fact that other legal processes have been brought into operation against the extradited party. The question is whether a lawful extradition has placed him within the reach of these other processes. If extradition be the method of obtaining the custody, and there has been no lawful extradition, then the whole custody is "without legal authority," and the party is entitled to be discharged therefrom and also from restraint by other process, by any court, whether in the demanding or the delivering State, competent to inquire by *habeas corpus* into the case.

7. **The Matter of Frank Cannon, 47 Mich. 481.**—The facts of this case are as follows :

Cannon was extradited from Kansas on a complaint charging him with seduction, and, on the 12th of December, 1881, brought before a justice of the peace in Michigan for examination. The justice adjourned the hearing to the 27th of December, and, on Cannon's failure to give bail, committed him to prison. On the 15th of December he gave the necessary bail and was released from prison. Proceedings in bastardy were, on the 16th of December, commenced against him by the prosecuting attorney for the transactions involved in the complaint of seduction for which he was extradited, and he was arrested on a warrant on the 17th of December and brought before the justice of the peace who adjourned the proceeding to the 20th of December, and Cannon, failing to give bail for his appearance, was committed to prison.

On the 20th of December, Cannon refused to plead to the merits in respect to the bastardy proceedings, and asked for a discharge on the ground of exemption from any prosecution, except for the crime for which he was delivered up by the Governor of Kansas. The justice declined to discharge him and ordered him to recognize for his appearance at the next term of the Circuit Court, to answer the bastardy charge. Refusing to do so, he was committed to prison and held in custody until a writ of *habeas corpus* was sued out from the Supreme Court of Michigan. On the 27th of December he was brought before the justice of the peace on the seduction charge, and the charge was at once discontinued on the admitted ground that it was not founded on any legal reasons.

These facts show that, while Cannon was demanded and deliv-

ered up as a fugitive from justice on the charge of seduction, an attempt was made to hold and prosecute him on that of bastardy, which, so far as it was a crime at all, was not the offense set forth in the extradition proceedings. Cannon was in custody upon this charge, that of seduction having been abandoned altogether. He sued out a writ of *habeas corpus* from the Supreme Court of Michigan; and this brought the question of the lawfulness of the custody directly before the court.

Judge Cambell, after stating the facts of the case, gave the opinion of the court as follows:

"The only question before us is whether, under these circumstances, the imprisonment for bastardy was lawful."

"For the purposes of the present hearing it is not made a point that the prosecuting attorney, when he obtained the extradition, procured it with an actually fraudulent design of getting the prisoner within the jurisdiction for different proceedings. It may be assumed that he supposed the seduction complaint would lie. It is admitted, however, that the attorney became satisfied to the contrary on the 16th, and that he, without supposing it was improper, set on foot the bastardy proceedings, and caused the arrest with that knowledge."

"It was claimed on the argument that, when arrested for bastardy, Cannon was not under legal restraint, but at large, and, therefore, that he was no longer under the operation of the extradition proceedings. This position is not true. He was bound to appear before the justice on the 27th of December, and would forfeit his bail if he did not. His bail were in law entitled to his custody, and could at any moment have handed him over to the authorities. The legal duress in such a case is not ended until the prisoner is discharged."

"The admitted facts show, then, that the criminal proceedings were kept on foot for more than ten days after they were known to be groundless, and until the bastardy examination had been ended and the prisoner bound over and committed on that. And they show, also, that the second arrest was made under the same control and management as the first, and by the same prosecuting attorney."

"The question then becomes narrowed to the inquiry whether an arrest made for a different purpose, on which no extradition could have been demanded, was lawfully made, when the prisoner was brought into this State under a requisition, and no proceedings had or attempted for the crime on which he was delivered up to the State."

"Under the laws of this country, and of most civilized countries, no person can be lawfully claimed, and here, at least, no person can be lawfully delivered over to another jurisdiction, except under some law authorizing it, and fixing the conditions on which it may be done. Under our Constitution, a treaty is the law of the land, and there is no treaty which does not define these conditions with some care. Under the Constitution of the United States such demand can only be made between States where the double conditions exist that the party demanded has been legally charged with crime and has fled from justice. And as no State can enter into an agreement with other States without the consent of Congress, and States cannot even with that consent make treaties, the power of demanding or of extraditing is confined to such criminal cases. Bastardy proceedings, although of a mixed character, involve no indictable offense on which a conviction could be had in their course, and they are not criminal proceedings in the proper sense of the term. Our own decisions have settled the character of such proceedings as not criminal. (*Cross v. The People*, 8 Mich. 113; *Lernon v. The People*, 42 id. 141; *Sutfin v. The People*, 43 id. 37; *Waite v. Washington*, 44 id. 388.)"

"We do not think the considerations involved in this inquiry have any special connection with State pride. The State of Michigan has no legal power to demand, and the State of Kansas has no legal power to deliver up, any persons but those charged as fugitive criminals. The constitutional safeguards on this subject concern the individual's liberty, and no one holds his liberty subject to State comity or on any less tenure than constitutional right."

"Can a person who has been demanded for prosecution as a criminal, and who could not have been demanded on any other ground, be arrested after arriving here, on a different complaint, and have his original accusation dropped by the same prosecuting attorney?"

"If the requisition had been made for an expressly fraudulent purpose and with no expectation of prosecution for the crime which was its pretext, we do not think any department of the Government could sanction such a use without the plainest perversion of justice. No ingenious reasoning could remove from such a transaction the disgrace which no decent commonwealth could afford to incur. It does not seem very clear to us that it would be much less fraudulent in law, or wrong in fact, to take advantage of such an extradition for a similar purpose, when it is discovered that it never ought to have been demanded, and was obtained on insufficient grounds."

"It is the law of this State, whatever doubts may exist elsewhere, that when the law compels a person to attend at a place

away from that where he is abiding, it at the same time usually protects him from having undue advantage taken of his unwilling and enforced presence. And this is no more than simple justice. Every one in legal custody has a right to legal protection. Accordingly it was held in *Watson v. The Judge of the Superior Court of Detroit*, 40 Mich. 729, that an arrest in a State court of a person attending under process of a Federal court was unlawful and should not be permitted, whether the Federal court interfered or not. The question was fully discussed on its general merits, and the very well considered case of the *Commonwealth v. Hawes*, 13 Bush (Ky.), 697, was referred to with approval, as declaring the correct doctrine on the subject. It was claimed on the argument here that, while that case may have been properly decided as applicable to extradition treaties with other nations, it had no bearing on extradition between States. We do not perceive any ground for the distinction. The duties of one State to another are measured by law, and not by their mere good pleasure; and so are the rights of citizens. The disregard of domestic duties and of foreign duties should not be considered as different in quality, and where both depend on law, it is impossible to find good reason for holding either class of obligations as undeserving of obedience."

"There has been some disposition to draw nice distinctions concerning the validity of arrests of persons who have been taken to the place of arrest under different process. Where both arrests are under the process of the same commonwealth and purely domestic throughout, there may be room for a good deal of discretion in such matters. And it is undoubtedly true that the analogies of these domestic cases have been followed in extradition cases by some courts of unquestioned eminence. In the conflict of opinion we feel bound to prefer the rule that compels regard to good faith. It is very well known that the perversion of extradition proceedings has, on more than one occasion, led to difficulties between nations, and to refusals by State executives to deliver up persons charged with crime whose arrest was supposed to be desired for sinister purposes. It is not always possible to get at the facts in such cases. But we think the courts of justice are bound, where a case comes before them which is entirely free from doubt, to refuse to allow any use to be made of such proceedings which would be a manifest violation of good faith, and a perversion of the measures which had been resorted to in order to bring the party accused within our jurisdiction."

"We do not deem it necessary to refer at large to the decided cases which were cited on the hearing. They cannot be reconciled in principle, although very few of them would conflict with our views on so plain a case as the present."

"The prisoner made out a case in our opinion rendering his confinement illegal, and entitling him to a discharge."

The doctrine adopted by the Supreme Court of Michigan in this case, and explained as to its reasons in the deliverance of Judge Cambell, is the direct reverse of that held by Judge Nixon in *The Matter of Noyes, supra*. Cannon was extradited on the charge of seduction, and, this being abandoned as untenable, he was then arrested and held in custody on the charge of bastardy.

The court held this custody to be unlawful, and discharged him therefrom, on the ground that his extradition for seduction exempted him from arrest and detention on a different charge. This is what Cannon claimed and what the court affirmed. The court, moreover, referring to the case of *Harves* decided by the Court of Appeals of Kentucky, said that the principle involved in such cases holds good, whether the extradition be inter-State or international. The question of good faith is the same in both forms of extradition.

**8. The Construction of the Constitution.** — Having cited the above cases we come now finally to an examination of the Constitution of the United States with reference to the question under consideration. The extradition provision of this instrument reads as follows:

“A person charged in any State with treason, felony, or other crime, who shall flee from justice and be found in another State, shall, on demand of the executive authority of the State from which he fled, be delivered up, to be removed to the State having jurisdiction of the crime.”

The word “State” occurs four times in this provision, and in each instance refers to one of the United States, or a State of the Union. Such a State is spoken of as the State in which the charge of crime is made, and in which, of course, it was committed, as the State from which the alleged criminal fled, and as the State having jurisdiction of the crime. These three uses of the term clearly refer to the same State.

The criminal, having fled from this particular State, is described as being found in another State of the Union. Here the term means the State to which he has fled, in which he did not commit the crime charged, which has no jurisdiction to try and punish him therefor, and from which he is to be removed by the process of extradition.

(1.) *The States Distinct and Separate.*—The first point to be considered is, that although the people of the United States are one people for certain general and national purposes defined in the Constitution, each State is a distinct and separate political community, and, except for the purposes of the Union and the Government thereof, independent of and foreign to every other State. The Supreme Court of the United States has repeatedly affirmed this doctrine.

The court, in *Buckner v. Finley*, 2 Pet. 586, said that “for all National purposes, embraced by the Federal Constitution, the States and the citizens thereof are one, united under the same sovereign authority and governed by the same laws,” and that “in all other respects the States are necessarily foreign to and independent of each other.” It was on the ground of the political distinctness of the several States of the Union that the court, in this case, held that a bill of exchange drawn in one State upon a person in another State, and payable in the latter State, is to be deemed a foreign bill within the meaning of the eleventh section of the Judiciary Act of 1789. (1 U. S. Stat. at Large, 73.)

In *Rhode Island v. Massachusetts*, 12 Pet. 657, 720, the same court spoke of the several States as “sovereign within their respective boundaries, save that portion of power which they have granted to the Federal Government, and foreign to each other for all but Federal purposes.”

So, also, in *Lane County v. Oregon*, 7 Wall. 71, 76, it was said by the court: “The people of each State compose a State, having its own government, and endowed with all the functions essential to separate and independent existence.”

The court, in *The Collector v. Day*, 11 Wall. 113, 125, said that “in many of the articles of the Constitution the necessary existence of the States and, within their spheres, the independent authority of the States are distinctly recognized.” It was hence held in this case, that Congress has no power to impose a tax upon the salary of the judicial officer of a State.

The States of the Union, though not known as nations in the great family of nations, are not mere municipalities created by the General Government, but distinct political communities, each sovereign in its own sphere, and each independent in that sphere of every other State. Each State has its own constitution and its own local government, enacts and executes its own laws, and

within its jurisdiction no other State has any political or judicial power whatever. The States of the Union are, in these respects, as distinct and independent of each other as they could be if separated by intervening oceans.

(2.) *The Extradition is Inter State.*—The next point to be considered is the fact that inter-State extradition, as provided for in the Constitution, is a transaction between these separate, independent and sovereign States, having no jurisdiction, civil or criminal, in the territories of each other, and yet by reason of their contiguity furnishing an easy refuge for criminals fleeing from one to the other. The transaction is conducted by their respective executive authorities; and these authorities act in their official character as State Governors, and, as such, represent the sovereignty of the States for which they act. (*Taylor v. Taintor*, 16 Wall. 366, 370.)

The concurrent action of two sovereign States, each acting through its supreme executive authority, is involved in every case of extradition. One of these States, in the exercise of its sovereignty, and by virtue of a right secured to it by the Constitution of the United States, demands the fugitive criminal of the State to which he has fled and in which he is found; and the other State decides whether the case presented in the demand comes within the provisions of the Constitution and the law on this subject, and, if it does, makes the arrest and delivery. The demand does not complete the case, and yet there can be no delivery without a demand. The demand and delivery are distinct functions; the one performed by the demanding State and the other by the delivering State; and when both are performed we have a case of extradition.

The State that makes the delivery cannot try and punish the fugitive since he has committed no offense against its laws; and the State against whose laws he has committed an offense cannot try and punish him until it gets his person within the jurisdiction of its courts. The surrender of the accused party by the State to which he has fled, upon the demand of the State from which he fled, gives to the latter State the necessary custody of his person; and the Constitution and law provide that this shall be done in the case specified.



(3.) *The Case Specified.* — This then brings us to the important question: What is the case specified? The Constitution and the law are explicit in setting forth the following elements as constituting this case, all of which must be present in each case:

(a.) The person must be demanded as a fugitive from justice, by the executive authority of the State from which he fled, and this demand must be addressed to the executive authority of the State to which he has fled and in which he is found.

(b.) This person must be charged, in the State making the demand, with some particular crime as having been by him committed against its laws.

(c.) The form of the charge made must be that of an indictment found or an affidavit made before a magistrate, alleging the crime and stating the material facts which constitute that crime.

(d.) The evidence of such a charge must be a copy of the indictment or affidavit, certified as authentic by the executive authority of the State making the demand.

(e.) The fact that the person thus demanded and charged has fled from the demanding State as a fugitive from justice, and is found in the State to which the demand is addressed, must be shown by legal evidence.

This is the exact case, as specified in the Constitution and the law; and when all these elements appear then the obligation of delivery exists. The demanding State in exercising the constitutional right of demand, must do so in the manner prescribed by law; and this requires it to declare beforehand the specific purpose for which it demands the surrender of the alleged fugitive. This declaration it makes in charging the crime; and it, moreover, makes the declaration to the executive authority of another State, as the constitutional condition of its right to demand the arrest and surrender of a person in that State, otherwise entitled to the protection of its laws, in order that he may be removed therefrom, and may, in the demanding State, be tried for the crime legally charged against him.

Now, to use the Constitution and the law for the purpose of forcibly removing a person, on the charge of a specific crime, from one State to another in order that he may in the latter State be tried for that crime, and then to use the custody thus secured for a different purpose, is to make a case different from the one con-

tained in the Constitution and the law, different from the one that appeared in the extradition proceedings, different from the avowed purpose of the demanding State at the time of making the demand, and different from the case that was before the delivering State and on which it passed judgment as to the obligation of delivery. The State that takes this course after obtaining possession of the fugitive, gives the lie to its own official declaration; and, if at the time of seeking the possession it meant to do so, then it meant to perpetrate a fraud upon the surrendering State.

Such a course would plainly carry the jurisdiction exercised over the surrendered party beyond the point and beyond the purpose contemplated in the Constitution and the law. That purpose, as expressly stated, is that the party demanded and charged with a specific crime by one State and arrested and delivered up by another State, may "be removed to the State having jurisdiction of the crime" charged, and that he may there be put on trial for that crime. It is no part of this purpose that the party being delivered up in the manner specified, should, at the pleasure of the State receiving him, be held and tried for other crimes, or that he should be arrested and held to bail in civil actions by creditors, whether these creditors procured his extradition or not. Either proceeding would be foreign to and in excess of the one purpose for which, under the Constitution and the law, the demand was made by one State, and the arrest and delivery were ordered by the executive authority of another State.

The Constitution furnishes the extradition remedy for the case which it describes, and for no other case; and the arrest of the extradited party in a civil action, or his trial for an offense different from the one specified in the proceedings, is a use of the custody thus secured that is not in that case. It must be put there, if at all, by judicial construction; and such construction we are compelled to regard as an abuse of the remedy.

It is due to good faith between the States, to the sovereignty of the States as distinct political communities, to the terms of their intercourse with each other in demanding and surrendering fugitives from justice, and to the plain intent of the Constitution in providing the extradition remedy, that when one State in this way obtains the custody of a person it should limit the use of

that custody to the purpose for which it was obtained, and which was distinctly avowed by it when obtaining the same ; and hence, when this purpose has been gained, the State demanding and receiving the fugitive should interpose no legal hindrance to his freedom of departure and return to the State from which he was thus removed. The matter for which he was brought into the State having been legally disposed of, then, in the language of Judge Cooley, he has a right "to depart in peace." Any other course, if originally intended, would be a fraud on the part of the demanding State, and, if not so intended, would be an act of bad faith.

Extradition is not a transaction between the extradited party and the person or persons who may have procured the extradition, but between two sovereign States for the purpose of public justice in the case specified. These States are bound to act in good faith toward each other, no matter what may have been the motives of private parties in seeking the extradition. One of these States sets forth its case, and if the other responds affirmatively by compliance with its demands, as it will be bound to do if the case comes within the provisions of the Constitution and the law, then the former State will be equally bound in honor to confine the exercise of its jurisdiction to the case presented.

(4.) *Analogous to International Extradition.*—Essentially the same reasons for pursuing this course apply that operate when the extradition is international. The transaction, in international extradition, is between distinct, independent, and sovereign nations ; and, in inter-State extradition, it is between distinct, independent and sovereign States. In the one case the law of the extradition is a treaty with its conditions ; and, in the other, the law is the Constitution of the United States and the law of Congress enacted in pursuance thereof. In both there must be a formal demand, and also a legal and specific allegation of the particular crime for which the extradition is asked. In both there is a compulsory removal of the person accused from one jurisdiction to another, that he may be brought to trial by the authority "having jurisdiction of the crime" in respect to which the extradition was granted by the delivering State or nation. The purpose of the extradition, in respect to the crime, is, in both cases,

explicitly stated beforehand. The State or nation asked to make the delivery, is told, in definite terms, for what the request is made, and, before complying therewith, it determines whether the request comes within the provision of the law or the treaty, as the case may be.

There is, in fact, no distinction between these two forms of extradition that implies a difference in the rule relating to the uses to which the custody, thus gained, may be legitimately applied, or that affects the obligation of good faith in either case. A State, whether in demanding or surrendering a fugitive criminal, acts as if it were a sovereign nation, and for this purpose it exercises the prerogatives of a nation. Other States, not involved in the matter, have nothing to do with the question pending between the two States directly concerned in a particular case; and the General Government has nothing to do with it. The question belongs exclusively to these two States, and their intercourse with each other is that of separate and independent States, as much so as if they were separate and independent nations.

The Supreme Court of Michigan, in *The Matter of Frank Cannon*, 47 Mich. 481, referred approvingly to the doctrine adopted by the Court of Appeals of Kentucky, in *The Commonwealth v. Harves*, 13 Bush, 697, and then proceeded to say:

"It was claimed on the argument here that, while that case may have been properly decided as applicable to extradition treaties with other nations, it had no bearing on extradition between States. We do not perceive any ground for the distinction. The duties of one State to another are measured by law, and not by their mere good pleasure; and so are the rights of citizens. The disregard of domestic duties and of foreign duties should not be considered as different in quality, and where both depend on law, it is impossible to find good reason for holding either class of obligations as undeserving of obedience."

If it be true that a fugitive who flees to a foreign country acquires the right of asylum to the extent afforded by its laws, and that he can be removed therefrom to another jurisdiction only by its consent and action, then it is just as true that the fugitive who flees from one State to another and takes up his domicile in the latter State becomes an inhabitant of that State, and, like any other inhabitant, is, for the time being, subject to and pro-

tected by its laws, and that he cannot be arrested therein and removed therefrom, under the extradition provision of the Constitution and the law of Congress, without the consent and action of that State. He is, in the absence of such consent and action, secure against any arrest for a crime committed against the laws of another State. The criminal processes of no other State can act upon him while he is there. He may be kidnapped and thus taken out of the State; but this is not extradition according to law.

The Constitution and the law make it the duty of the asylum State to give the necessary consent and put forth the necessary action when, and only when, the prescribed conditions are present; and one of these conditions is a specific and definite charge of a particular crime, as the ground of the removal, and also a declaration of the purpose for which the removal is sought.

The obvious implication, arising from this condition, is that the State receiving the fugitive under the Constitution and the law, like a nation receiving a fugitive under a treaty, should use the custody only for the purpose professed when acquiring it, and which was had in view by the delivering authority when making the arrest and surrender. This implication naturally arises from the Constitution and the law; and, if so, then it is as binding on State courts as it would be if it had been stated in express words. What the Constitution or the law, by a just and fair construction implies, is a part of that Constitution or that law.

(5.) *Facility for Abuse of the Remedy.* — Moreover, if the State that makes a specific charge of crime against one who is the inhabitant of another State, and hence under the protection of its laws, as the basis on which it demands his surrender, and then on this basis receives the alleged fugitive by the arrest and delivery of the latter State, may, having thus obtained the custody, proceed to deal with that fugitive in respect to a wholly different matter, of which not the remotest hint was given to the delivering State in the proceedings, then the extradition remedy furnished by the Constitution may easily be used for purposes not at all intended or contemplated by it. This theory supplies facilities for bringing a criminal charge against an inhabitant of another State, not for the purpose of public justice in

his trial and punishment, but to obtain possession of his person as preliminary to other proceedings against him.

The criminal charge, for example, may be that of false pretenses or embezzlement; and the real object of the party seeking the extradition and making the charge, may be to compel the person to restore property or pay debts, as the condition of not being prosecuted on this charge. This has often been attempted and sometimes accomplished. Extradition may thus be made a shorter and easier route to the result than a civil suit against the fugitive in the State to which he has fled. The creditor appears in the character of a complainant charging a crime, and invokes the machinery of extradition law, not to punish a crime, but to aid him in the collection of a debt.

The Constitution furnishes both the facility and the temptation to fraud against its own intention, if we assume that a State having obtained the extradition of a person on a specific charge of crime, may then, in its discretion, prosecute him for that crime, or for some other crime, or may use the custody thus acquired for other purposes than the one purpose that appeared in the proceedings. Much more consistent with the letter and the design of the constitutional provision, and much less likely to involve an abuse of the extradition authorized by it, is the theory that the State receiving the fugitive must limit its judicial action to the case which it presented when asking for the delivery. This is the case, and the only case, known to and considered by the delivering State at the time of the surrender. It is the case for which the remedy was provided, and hence the only one in respect to which the custody should be used.

The Constitution certainly does not mean one thing when the Governor of a State is asked to make a delivery under it, and another and a different thing when the judicial authority of another State proceeds to take charge of the surrendered fugitive. The meaning is the same in both cases, so far as the principle involved is concerned; and in the one case the meaning is that the alleged fugitive shall be delivered up for the specific crime properly charged against him; and, in the other, it is that the receiving State may have the opportunity of dealing with the offender for that crime, and that only.

The delivery is a *special* one, made under a special provision, and for a special purpose, and hence the custody, thus granted on

the one hand, and acquired on the other, should be equally special and definite in the uses to which it is applied. Any departure from this rule on the part of courts goes beyond the end intended to be accomplished by the Constitution, and in this sense violates the provision itself. Judge Cooley, in the language already quoted, characterizes it as "a gross violation of the constitutional compact."

(6.) *A Question Answered.*—What then, it may be inquired, shall be done with that general principle of law laid down by the English and adopted by the American courts, that when one is within the jurisdiction of a court, and there properly charged with crime, the court may hold him and proceed to his trial without any reference to the circumstances under which he was brought within such jurisdiction? There is no doubt of the existence of such a principle, or that courts have been in the habit of acting upon it. The Supreme Court of Vermont, in *The State v. Brewster*, 7 Vt. 118, held that the fact that Brewster had been kidnapped in Canada and had been forcibly brought into the State of Vermont, without the assent and action of the Canadian authorities, was not a matter of any legal consequence, considered with reference to his liability to be tried on the indictment found against him in that State.

This case followed the general rule which has been frequently affirmed and applied by courts. (*Rees v. Marks*, 8 East, 175; *Ex parte Kraus*, 1 Barn. & Cress. 288; *The Case of Susannah Scott*, 9 id. 446; *The State v. Smith*, 1 Bailey, 283.)

This rule, however, is less authoritative in this country than the Constitution of the United States, and less authoritative than treaties with foreign nations made in pursuance thereof. If, therefore, we have given the proper construction of the extradition provision of this Constitution, the rule or principle in question is not applicable to cases of inter-State extradition. It is, in these cases, overruled and set aside by the "supreme law of the land."

The design of the preceding argument upon the construction of the extradition provision of the Constitution has been to show that the process of getting the accused party from one State to another, as provided for in the Constitution, implies a limitation of the jurisdiction of the latter State to the legal purpose for

which he was brought there, and that, when this purpose is accomplished, the party has the right of unmolested departure from the State, without interference by other legal processes. If this be so, then the limitation thus arising is, in this country at least, a conclusive reason why the principle of law, above referred to, should be so qualified in its application as to make it consistent with the Constitution of the United States. The latter, being the "higher law," should govern in an extradition case, rather than any merely judge-made law.

Judge Nixon, in disposing of the case of *Noyes*, previously considered, contented himself with referring to this general principle of judge-made law, and to the authorities setting it forth, without inquiring whether the extradition provision of the Constitution does or does not qualify the application of that principle so far as cases of inter-State extradition are concerned. If it does, as for the reasons above stated we think to be the fact, then that qualification is to be accepted as the law for courts, no matter what principles of law they are accustomed to apply in other cases. The extradited party is, in the State to which he is extradited, entitled to whatever immunity, exemption, or protection is afforded to him by the Constitution of the United States, whether given in express words, or by obvious and natural implication.

NOTE.—The recent case of *The State v. Stewart*, 80 *Albany Law Journal*, 216, or 19 N. W. Rep. 429, having been reported too late for insertion in the body of the above chapter, is here added as a supplementary note. The case was, on a writ of *certiorari*, considered and determined by the Supreme Court of Wisconsin, May 15, 1884. The facts, as stated by the court, are as follows :

"The relator was arrested in Indiana upon a requisition issued by the Governor of Wisconsin, upon a complaint in Justice Court, Columbia county, Wisconsin, charging him with embezzlement of property belonging to James Gowan, in that county, and brought into that county, where he was tried for that offense upon an information filed in the Circuit Court for that county, and acquitted upon the trial, and thereupon discharged by the court; that immediately thereafter and before he had time to leave the court-room, he was arrested upon a warrant issued by a justice of the peace of that county, upon a complaint for obtaining property, to-wit, a horse from Edward Lee, by false pretenses, in that county, and was taken before a justice of the peace therein for examination, December 29, 1883, and thereupon the justice adjourned the hearing, and entered such adjournment in his docket as follows : 'December 29, 1883, nine A. M. The witnesses for the State not all being present, the court took a recess until one o'clock, P. M.' At one o'clock, P. M., the parties all being present, the justice proceeded with the examination, and afterward committed the defendant to the county jail of said county to await his trial. That whatever representations were made by the relator, constituting the false pretenses alleged, were made at Portage, in that county, and that thereafter the relator went to the county of Sauk, but within twenty rods of the boundary



line between that county and Columbia county, and obtained the horse. While the relator was being so held by the sheriff on the last-mentioned charge, he was brought before Hon. Alva Stewart, judge of the Circuit Court for that county, on *habeas corpus*, and after hearing thereon he was ordered by that judge into the custody of the sheriff of Columbia county. To review that order this *certiorari* is brought."

The relator, having been extradited from Indiana to Wisconsin, on the charge of embezzlement, and having in the latter State been tried for the same and acquitted, was, immediately after his acquittal, arrested for another and different offense, and committed to prison to await his trial therefor. He sued out a writ of *habeas corpus*, claiming that the arrest for the last offense was illegal, because it was made so soon after his acquittal on the charge for which he had been extradited, that it precluded the exercise of his right to return to the State from which he had been thus removed. Judge Stewart, who issued the writ of *habeas corpus*, held that this claim, on the ground set up, was not valid, and remanded the relator to custody. This ruling, in effect, decides that an extradited party, having been tried, acquitted and discharged in respect to the offense for which he was extradited, is not entitled to the right or privilege claimed by the relator in this case, but may be immediately arrested on the charge of another and different offense alleged to have been committed by him within the same jurisdiction prior to his extradition.

The main question before the Supreme Court of Wisconsin, in reviewing the case, was whether this ruling is correct; and this question was answered in the affirmative. Judge Cassoday, who delivered the opinion of the court, referred to the *Case of Cannon*, 47 Mich. 481, decided by the Supreme Court of Michigan, and then proceeded to say:

"It has frequently been held in effect, however, by courts of equal ability, that a fugitive from justice extradited under the Constitution and laws of the United States, on the charge of the commission of a specific crime, and discharged therefrom, can be held by the courts of the State to which he is surrendered for another and entirely different crime. (*In re Noyes*, 17 Alb. L. J. 407; *In re Miles*, 52 Vt. 609; *Ham v. State*, 4 Tex. App. 645; *Williams v. Bacon*, 10 Wend. 636; *Browning v. Abrams*, 51 How. Pr. 172; *Dow's Case*, 18 Penn. St. 37.)"

In concluding the opinion upon this branch of the case, the judge further said:

"It follows that the relator might have been again extradited had he been allowed to go to Indiana after being discharged on the first offense. This being so, there seems to be no practical reason for holding the relator could not be legally arrested immediately upon the discharge from the first offense, instead of being allowed to escape the State and then brought back on requisition. Such an arrest in such a case was certainly not in violation of any law of the United States. It was not in conflict with any agreement between the States. It was no breach of any executive pledge. It was no interruption of any comity between the States. We must, therefore, hold that the arrest was not illegal by reason of any of the objections mentioned."

This ruling, though perhaps sustained by a preponderance of judicial authority, is in conflict with the view of Judge Cooley, and with that of the Supreme Court of Michigan, as quoted in the above chapter. Nor does it accord with the opinion of Judge Daniels in *Lagrange's Case*, 14 Abb. Pr. (N. S.) 333, who in this case said: "In principle, there can be no practical difference between the case of a fugitive brought from a neighboring State under the Constitution and laws of the United States, and one brought from a foreign country under the provisions of treaties. In each the right of freedom to return is precisely the same."

The question decided by the Supreme Court of Wisconsin has not often arisen in the courts of this country; and when it has arisen the decisions have by no means been uniform. It has never been before the Supreme Court of the United States, and it must hence, by reason of the conflicting opinions of lower courts, be regarded as an unsettled question.

The Constitution of the United States is the supreme law of the land; and whatever it implies is as much a part of this law as if it were stated in express

terms. The author of this treatise has expressed the opinion, with the reasons therefor, that the provision of this Constitution in relation to inter State extradition does fairly imply that the party extradited under it is to be tried only for the crime charged against him in the proceedings, and for which he was delivered up, and that when the claims of justice in respect to this accusation have been legally disposed of, then, if committing no offense subsequently to his extradition, he has a constitutional right, in the language of Judge Cooley, "to depart in peace," and that it is the duty of courts to secure to him, as against all attempts at legal interference therewith, a reasonable opportunity to exercise this right.

This doctrine, though not in accordance with all the judicial opinions on the subject, perhaps not with a majority of these opinions, the author believes to be correct. The preponderance of authority sustains it when the extradition is international; and there is no such difference between this form of extradition and that which is inter-State, as to confine the doctrine to the former and exclude it from the latter. It is true that, as to the latter, the Constitution does not, in express words, establish the doctrine; yet if its provision on the subject naturally and properly implies it, as we think it to be the fact and have attempted to show, then this is sufficient. The implication, if real, has all the force of express language.

## CHAPTER XIII.

## EXTRADITION TO A THIRD STATE.

1. **Statement of the question.**—There remains one other question to be considered in respect to inter-State extradition, and that question is whether a person who, under the Constitution of the United States and the law of Congress, has, on the charge of crime, been extradited from one State to another, and whose case in the latter State has been legally disposed of by his acquittal, or by his discharge on *habeas corpus*, or by his conviction and endurance of the penalty, so that the justice of that State has no further demand against him, can, by the Governor of that State, and before he has had an opportunity to depart therefrom, be arrested and surrendered on the requisition of the Governor of another State.

This question has seldom arisen for either executive or judicial consideration. There are but two reported cases in the whole history of inter-State extradition that have any bearing upon it, and these cases will be examined in this chapter.

2. **Daniel's Case, Binns's Justice, 8th ed. p. 439.**—This case came before Judge Parsons, of the Quarter Sessions in Philadelphia, in 1848, and the doctrine adopted by the court, as stated by Mr. Binns, is the following :

“Where a defendant is brought into a State as a fugitive from justice, after acquittal, or conviction and pardon, he cannot be surrendered to the authorities of another State as a fugitive, but must be allowed an opportunity to return to the State in which he is domiciled.”

No statement is made as to the particular facts of this case; yet the doctrine here adopted gives a negative answer to the above question. The State receiving the fugitive by extradition cannot, according to this doctrine, after satisfying its own claims against him, surrender him to another State, so as to deny to him “an opportunity to return to the State in which he is domiciled.”

3. **The People, ex rel. Suydam, v. Sennott, 20 Albany Law Journal, 230.** — This was a case of *habeas corpus*, on the petition of Suydam, before the Circuit Court of Cook county, in Illinois.

(1.) *The Facts of the Case.* — The facts of this case, as stated by Judge McAllister in his deliverance, are as follows: "Mr. Suydam, at the time of the requisition a resident in the State of New York, was demanded by the Governor of Illinois as a fugitive from the justice of the latter State, and, in response thereto, the Governor of New York ordered his arrest and delivery to the authorities of Illinois. Having been transported to Illinois and being there discharged in a proceeding on *habeas corpus*, he was, immediately after his discharge, and before he had any opportunity of leaving the State and returning to New York, arrested on a warrant issued by the Governor of Illinois, in compliance with a requisition from the Governor of Pennsylvania, demanding him as a fugitive from the justice of the latter State.

Suydam took the ground that the arrest under the warrant of the Governor of Illinois was illegal, and, before his actual removal from the State, he sued out a writ of *habeas corpus* from Judge McAllister, to test the legality of his imprisonment. The specific point set up in his claim was that, having been removed from New York to Illinois by the process of extradition, he had *not fled* to the latter State as a fugitive from justice, but was brought there by compulsion of law, and hence that the Governor of Illinois had no authority to order his arrest and delivery to another State, and thereby deny to him the opportunity of voluntary departure from Illinois, after the whole matter for which he was brought there had ended in his legal discharge.

Judge McAllister, after hearing the case, held otherwise, dismissed the writ, remanded the prisoner to custody, and thus in effect gave an affirmative answer to the question stated in the commencement of this chapter, and also rejected the doctrine laid down by Judge Parsons in *Daniel's Case*. The *Chicago Legal News* of December 13, 1879, says that Judge Drummond, in a *habeas corpus* proceeding afterward approved of the ruling of Judge McAllister in this case.

Judge McAllister, in stating the facts as they appeared on the hearing, gives the following history of Suydam: 1. That, being a resident of West Virginia, he went in 1874 to Pittsburg, in Pennsylvania, and there committed the crime for which he was indicted in 1879, and which was the basis of the requisition made by the Governor of Pennsylvania. 2. That, soon after committing this crime, he went back to West Virginia. 3. That late in the year 1875 he came to Illinois and resided for about two years in Chicago, where he committed the offense charged against him in the extradition proceedings that procured his surrender by the Governor of New York. 4. That, fleeing from Illinois to New York, he there resided until May, 1879, when he was brought back to the former State by the process of extradition.

It is easy, from this statement, to see how the Governor of Pennsylvania might have demanded the surrender of Suydam from the Governor of West Virginia, if the proper preliminary proceedings had been instituted while he was in the latter State; or how the demand, upon the same conditions, might have been addressed to the Governor of Illinois during Suydam's residence in that State; or how it might, upon the same conditions, have been addressed to the Governor of New York while he was domiciled there. If he was a fugitive from justice at all, he was so first from Pennsylvania to West Virginia, then to Illinois, and then to the State of New York, and might, by Pennsylvania, have been extradited from any one of these States if the proceedings had been taken while he was there. The fact that he came to New York by first going to West Virginia, and then going to Illinois, would not change his character as a fugitive from justice.

This, however, was not the case before Judge McAllister. The case upon which he had to rule, and upon which he did rule, was whether Suydam, being in Illinois not by flight to that State, but by the compulsory process of extradition, and being there legally discharged as to the crime for which he was brought there, could, immediately after the discharge, and before any opportunity for his own voluntary departure, be arrested by the warrant of the Governor of Illinois and delivered to the authorities of the State of Pennsylvania. Had the Governor of Illinois, in the circumstances as existing at the time, legal authority for the issue of his

warrant of arrest and delivery? Judge McAllister answered this question in the affirmative.

(2.) *The Governor's Power.* — In looking at the question, as thus presented, it should be kept in mind that the Governors of States have no *general* power of issuing warrants of arrest. So far as they possess the power of issuing such warrants in respect to fugitives from justice, they derive it from a *special* grant of authority, and are limited in the exercise thereof to the precise terms of the grant. In other words, they are to be governed by the law that gives the power, and by the rule which the law prescribes. A lawless exercise of such a power, by the Governor of a State, is not to be tolerated for a moment. No one domiciled in a State holds his liberty, or his right to remain in that State, at the discretion of the Governor thereof.

Judge Cooley says: "The executive has no general power to issue warrants of arrest, and when he proceeds to do so in these cases his whole authority comes from the Constitution and the act of Congress, and he must keep within it." (*Princeton Review* for January, 1879, p. 165.)

Mr. Rorer, having referred to that clause of the Constitution which provides that "the citizens of each State shall be entitled to all privileges and immunities of citizens in the several States," proceeds to say:

"A citizen of one State has not only a right to change his residence into another State, but also a right to become a citizen of the latter, and there remain, as against all natural right of such State to extradite him, banish him, or deliver him over to any other actual or pretended power; and it results, therefore, that the only authority, as between the American States, for the extradition of criminals, is that provided by the National Constitution, and if the proceeding be not in conformity thereto, extradition cannot be enforced." (*Inter-State Law*, 225.)

The Constitution does not leave the question of extradition between States to their discretion, or to mere State comity. It regulates the subject by a special provision; and Congress, in the exercise of its power to carry the provision into effect, has legislated in regard to it. The provision itself and the legislation of Congress for its execution, are a part of the supreme law of the land.

The question then arises whether the power of State Governors to issue warrants for the arrest and delivery of fugitive criminals, conferred by the Constitution, or by the law of Congress, or by both, extends to such a case as that of Suydam at the time when the Governor of Illinois issued the warrant for his arrest and delivery to the authorities of Pennsylvania. If it does not, then the warrant was without legal authority, and Suydam was entitled to a discharge from custody under it.

(3.) *The Constitutional Provision* — The provision of the Constitution relating to inter-State extradition reads as follows:

“A person charged in any State with treason, felony, or other crime, who shall flee from justice and be found in another State, shall, on demand of the executive authority of the State from which he fled, be delivered up, to be removed to the State having jurisdiction of the crime.”

This provision is evidently not self-executing since it does not designate the authority to which the demand shall be addressed, and by which the delivery shall be effected, or the manner in which the charge of crime shall be made and authenticated. It was on this ground, in part, that Governor Randolph, of Virginia, in 1790, before Congress had passed any law on the subject, refused to comply with the request of Governor Mifflin, of Pennsylvania, for the delivery of certain alleged fugitives from the justice of the latter State.

The fact is that, while the right to make the demand is given, and the obligation to make the delivery is imposed by the Constitution of the United States, no provision is therein made for the agency of this delivery or the manner of its action. This is left to be supplied by legislation, and, without the requisite legislation, State Governors would have absolutely no power to order the arrest and delivery of fugitive criminals. They possess this power, not by any direct grant of the Constitution, but by the legislation of Congress; and if Congress had chosen to vest the power in a different agency, as it might have done, then State Governors would have been wholly without the power.

Judge Deady, in *In re Doo Woon*, 18 Fed. Rep. 898, remarked: “The right of one State of the Union to demand of another the delivery of a person who has fled from justice, depends upon the

Constitution of the United States ; and the mode of proceeding and the evidence necessary to support such demand is prescribed by the statute of the United States." This question of the "mode" includes the agency or authority by which the mandate of the Constitution is to be carried into effect ; and this agency or authority, whatever it may be, is endowed for this purpose, not by the Constitution itself, but by the law of Congress. The Constitution authorizes Congress to legislate on the subject ; and State Governors get their authority to issue extradition warrants from the legislation of Congress.

The person over whom this authority is to be exercised is, in the Constitution, described as "a person charged in any State with treason, felony, or other crime, *who shall flee from justice and be found in another State*," and who shall be demanded by the "executive authority of the State from which he fled." The words placed in italics are the important words to be considered in this connection.

The party here described flees from justice — that is to say, he flees from the justice of the particular State in which he committed the crime, and which brings the charge against him. He does so by going out of the State, since if he simply flees from one part of the State to another part of the same State, he will not flee at all within the meaning of the Constitution. He must actually flee from the State altogether, in order to come within this meaning.

Where then does this party, in the contemplation of the Constitution, flee to ? Where does he stop in his flight and there seek an asylum of safety from justice ? If he flees to a foreign country and is found there, the provision has no application to him. It is only when he flees to some *other* State of the Union than the one in which he is charged with crime, and is found there because he has fled to that State and has not fled therefrom, that the provision applies to him. If this be not the fact, then the case is not the one described in the Constitution.

It is quite true that the Constitution does not, in express words, speak of the party as *fleeing to some other State* ; yet it puts him there as the sequel and result of his flight from justice. He must flee from justice, and there is no way in which he can get



into another State or be found there, as the consequence of such a flight, except by actually going there. The Constitution clearly implies his flight to the State in which he is found, and that this is the reason why he is there, or is found there.

The two things specified — namely, the flight from the justice of one State and the being found in another State — are, in the Constitution, connected together by a copulative conjunction which associates them in the natural order of sequence. The party flees *and* is found in another State because he fled there. It is not enough that he simply flees, and it is not enough that he is simply found in another State. Neither fact, by itself, makes the case which the language of the Constitution presents. Both facts are necessary to make that case. The Constitution follows the party from the moment he starts on his flight from justice until he stops *somewhere*, either temporarily or permanently; and that *somewhere* is another State than the one from which he fled, no matter through how many States he may have passed in going there.

The extradition treaties of the United States speak of the accused party as seeking asylum, *or* as being found in the territory of either of the contracting Governments. It is enough under these treaties that the party is found in the specified territory, no matter how he came to be there. But it is not so under the extradition provision of the Constitution. Here the fleeing from the justice of one State and the being found in another State, because the party has fled *to* that State, are, by a copulative conjunction, connected together as essential parts of the same matter, and so connected that they cannot be disjoined without changing the meaning of the language, and, we may add, so connected that the flight *to* another State is obviously the implied antecedent of being found there. The language is not technical, but that of common life; and this is its natural construction.

Judge McAllister, in his construction of the Constitution, proceeded upon the theory that it is enough if the party being charged with crime by the demanding State as a fugitive from justice, is found in the State to which the demand is addressed, whether he had fled to that State or not. This, with all due respect to the learned judge, is not the case which the Constitution presents, saying nothing now about the construction given by the law of

Congress, from which State Governors derive their power to issue extradition warrants. The Constitution puts the party in another State as the sequel of his fleeing *to* that State.

The fact, in the case of Suydam, was that he was not found in Illinois at the time of his arrest for delivery to Pennsylvania, because he had fled to the former State, but was found there in virtue of an extradition process which forcibly brought him there, and, being discharged thereon, was arrested under another extradition process issued by the Governor of Illinois, before he had time to leave the State to which he had been extradited. It surely will not be claimed that the extradition process which brought him to Illinois, was, on his part, an act of fleeing from justice to that State, in the sense of the Constitution; and, if it was not, then he was not in that State at that time as a fugitive thereto from the justice of Pennsylvania. The fact is, that he fled from the State of Illinois to the State of New York, and, in being carried back by a legal process to the State from which he fled, he certainly did not flee to that State.

It is only a fugitive *from* a State and *to* a State that comes within the description of the Constitution; and such was not the case of Suydam. That instrument makes no provision for a series of successive extraditions of the same party, first by one State to another State, then by the latter State, when it shall have satisfied its claims against him, to a third State, and so on through as many extraditions as there may be States, one after another, demanding the custody of this party. The description which it gives of the person to be extradited from one State to another, precludes such a series of extraditions, unless we assume that extradition *to* a State is constitutionally the same thing as a flight from justice to a State.

(4.) *The Statutory Provision.* — We come now to the law of Congress, enacted to carry the constitutional provision into effect, from which law State Governors derive their authority to issue warrants for the arrest and delivery of fugitive criminals, and which must, therefore, be their guide on this subject. Section 5278 of the Revised Statutes of the United States provides as follows:

"Whenever the executive authority of any State or Territory demands any person as *a fugitive from justice*, of the executive authority of any State or Territory *to which such person has fled*, and produces a copy of an indictment found or an affidavit made before a magistrate of any State or Territory, charging the person demanded with treason, felony, or other crime, certified as authentic by the Governor or Chief Magistrate of the State or Territory *from whence the person so charged has fled*, it shall be the duty of the executive authority of the State or Territory *to which such person has fled*, to cause him to be arrested and secured, and to cause notice of the arrest to be given to the executive authority making such demand, or to the agent of such authority appointed to receive the fugitive, and to cause the fugitive to be delivered to such agent when he shall appear."

The parts of this section which, for our present purpose, deserve to be specially noticed, are placed in italics. The party to be arrested and delivered up is spoken of, in general terms, as "a fugitive from justice," which language is the equivalent of the words "who shall flee from justice," as found in the Constitution.

This party is to be demanded of the executive authority of the State or Territory *to which he "has fled."* His flight from justice is followed by the statute to the State or Territory to which he goes, and in which, by going there, he is found. The certified charge of crime is to come from the State or Territory *from which he "fled."* The power to cause his arrest and delivery in the presence of the specified conditions, is given to the executive authority of the State or Territory *to which he "has fled,"* and to no other authority.

These recitals of the statute are perfectly clear as to the person, and the only person who, under its authority, is to be arrested and delivered up. He must be "a fugitive from justice," in the sense of fleeing from the State or Territory bringing the charge of crime against him and making the demand for his delivery, and in the sense of fleeing to the State or Territory to which the demand is addressed. This is the exact description of the person given in the statute; and if the party charged with crime and demanded does not come within this description, then he does not come within the statute and is not the party to whom it applies.

The recitals are equally clear as to the authority empowered by

the statute to cause the arrest and delivery of the party described. That authority is "the executive authority of the State or Territory *to which* such person *has fled*," and, consequently, to which the demand, with the proper evidences as to the crime, was addressed by the executive authority of the State or Territory *from which he fled*. No other authority can, under the statute, order the arrest and delivery; and this authority, as known to the law and endowed by the law, is expressly vested in the Governor of the State or Territory to which the accused party "has fled." The actual fleeing *to* the State or Territory is legally as much a part of the case as the demand for delivery or any other element placed in it by law. It is one of the conditions of the power to make the delivery at all.

If, then, State Governors derive their power to order the arrest and delivery of fugitive criminals, not from the Constitution, since this does not give them the power, but from the law of Congress, it follows as a necessary inference that they must exercise the power in conformity with that law. A law that is the source of power is the rule for its exercise, and no part of it can be lawfully disregarded. Judge Deady, in *In re Doo Woon*, 18 Fed. Rep. 898, said: "The Executive of this State, in allowing the requisition of the executive of California, acts under the authority of the United States statute, and must conform to its directions and limitations."

A person who has not fled *from* the State demanding him, or, if he has fled therefrom, has not fled *to* the State asked to deliver him up, and who, if found in the latter State, is found there, not because he fled thereto, but because he has been carried there by the compulsory process of extradition, does not come within the terms of the statute referred to by Judge Deady. He is not the party therein described; and if so, then the statute gives to the Governor of the latter State no power to order his arrest and delivery to another State. Suydam, when arrested and delivered to the authorities of Pennsylvania, was not a fugitive *to* the State of Illinois, but was brought there under the compulsion of law; and, if so, then the Governor of that State had, under the statute of the United States, no authority to order his arrest and delivery. He was not the Governor of the State *to* which Suydam had fled, and in which he was found because he had fled thereto.

Judge McAllister, in deciding the case before him, makes no account of the fact that Suydam came to the State of Illinois in 1875, and remained there about two years, and then went therefrom to the State of New York, and there remained until he was brought back to Illinois by an extradition process. He mentions the fact, but it was no element of the case on which he based his decision. It was enough, in his view, that Suydam was set forth as a fugitive from the justice of Pennsylvania, and was found in Illinois, although it was true that he was there found, not by his flight to that State, but by forcible extradition thereto. This entirely overlooks that element of the law which makes flight to a State a part of the case. It treats that part of the law as having no legal significance.

It appears to be true that, when Suydam came to Illinois in 1875, he came there as a fugitive from the justice of Pennsylvania; and, if with the proper evidence as to the charge of crime, he had been demanded by the Governor of Pennsylvania while he was there, the case would have come within the terms of the law. But the moment Suydam left Illinois he passed beyond the jurisdiction of the Governor of that State, and that jurisdiction could attach to him again only in the event that he should come back to the State. Now, in the sense of law, he never did come back to that State as a fugitive thereto. He was brought back by the compulsion of law, and this was not his own act. He certainly was not fleeing from the justice of Pennsylvania to the State of Illinois when, being in the custody of the agent of the latter State, he was being removed from the State of New York to which he had fled, to the State of Illinois from which he had fled. The transportation, by an officer of law, of an accused party, from one State to another, is not his flight from justice.

It may be said that if this be the true construction of the Constitution and the law, then, in the event that a party is charged with crime in two different States and flees to a third State, and that, upon the demand of one of the two States he is delivered up by the third State, and in the further event that, after the State to which he was delivered up has legally disposed of his case so that it has no further claim upon him, he chooses to remain there and there take up his domicile, the other State would have

no means, by extradition, of getting possession of his person and bringing him to justice for an offense committed therein. This is undoubtedly true so long as he remains in the State to which he was extradited. There is no provision in the Constitution or the law of Congress for his extradition *from* that State if he chooses to stay there and does stay there. Such a case is not provided for by the extradition law of this country; and it is not the province of either courts or Governors to make the provision.

(5.) *The General Principle of Extradition.*—There is, moreover, a general principle relating to the subject of extradition, whether inter-State or international, that is involved in the question under consideration; and that principle is that, where a party is by extradition removed from one jurisdiction to another, his compulsory presence in the latter should not be there used for any purpose other than the one for which he was forcibly brought there, and that when this purpose has been gained he should, unless committing some offense while there, have a reasonable opportunity to depart therefrom, before being subjected to legal demands or restraints for other and different purposes.

Text writers, who have treated of the subject at all, have, with great uniformity, laid down this principle as fundamental in the general law of extradition. Their theory is that the jurisdiction that is made operative by this process, is special and not general, and hence that, when the purpose of the process has been gained, the party subject to it is entitled to the liberty of unmolested departure before he can be properly subjected to other processes of legal restraint. There is no such difference between international and inter-State extradition, as to imply that this theory is not equally applicable to both. The essential principles of both are the same. They differ only as to details which do not affect their general character.

It was with reference to inter-State extradition that Judge Cooley said:

“To obtain the surrender of a man on one charge, and then put him upon trial on another, is a gross abuse of the constitutional compact. We believe it to be a violation also of legal principles. It is a general rule that, where by compulsion of law a

man is brought within the jurisdiction for one purpose, his presence shall not be taken advantage of to subject him to legal demands or legal restraint for another purpose. The legal privileges from arrest, where one is in the performance of a legal duty away from his home, rest upon this rule, and they are merely the expressions of reasonable exemption from unfair advantages. The reason of the rule applies to these cases. It should be held, as it recently has been in Kentucky, that the fugitive surrendered on one charge is exempt from prosecution upon any other. He is within the State by compulsion of law upon a single accusation. He has a right to have that disposed of, and then to depart in peace." (Princeton Review for January, 1879, p. 176.)

It is true that Judge Cooley, in using this language, was not considering the specific question now under examination ; yet the language is just as applicable to this question as to the one he was considering. It contains a principle that covers both questions. If the trial of a party for a crime, different from the one on which he was surrendered, would be "a gross abuse of the constitutional compact" and "a violation also of legal principles," would the "abuse" and "violation" be less real, if the party surrendered and then acquitted in the State having jurisdiction of the crime for which he was surrendered, or discharged on *habeas corpus* in that State, should, before he had any opportunity "to depart in peace," be arrested and surrendered, as a fugitive criminal, to another State ? He was not brought into the State making the second surrender, for any such purpose ; and, according to Judge Cooley, he has a right to have the purpose for which he was brought there legally disposed of, and then "to depart in peace." A second surrender, without the opportunity of such departure, clearly interferes with the exercise of this right and also ignores the "general rule" of law stated by Judge Cooley, while it would be without authority in the Constitution and laws of the United States.

Judge McAllister said in this case that "the Governor [of Illinois] was under no duty to return him [Suydam] to New York, or to guarantee a safe return." This, while true, is not the question. The point to be determined is not whether it was the duty of the Governor of Illinois to make any provision for Suydam's return to New York after he had been discharged in

the former State, but whether under the Constitution and the law of Congress, and under the general principles of extradition law, he had the right, immediately after this discharge, to order the arrest and delivery of Suydam to the authorities of Pennsylvania, and thus prevent his return to New York by his own action.

This question Judge McAllister answered in the affirmative, and, with all due respect, we submit that the answer is not correct, and that the doctrine, as stated by Judge Parsons in *Daniel's Case*, presents the true view of the subject.





## APPENDIX.

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- I. EXTRADITION TREATIES OF THE UNITED STATES.
- II. EXTRADITION LAWS OF THE UNITED STATES.
- III. EXTRADITION LAWS OF THE STATES.
- IV. SECTIONS OF THE ENGLISH EXTRADITION ACT OF 1870.
- V. GOVERNOR CULLOM'S OPINION.



# I.

## EXTRADITION TREATIES OF THE UNITED STATES.

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THE extradition treaties of the United States, now in force, are thirty-one in number. The following presents the text of these treaties, in the order of their respective dates and designated by the countries with which they were made :

### I. GREAT BRITAIN, AUGUST 9, 1842.

ARTICLE X. It is agreed that the United States and Her Britannic Majesty shall, upon mutual requisitions by them, or their Ministers, officers, or authorities, respectively made, deliver up to justice all persons who, being charged with the crime of murder, or assault with intent to commit murder, or piracy, or arson, or robbery, or forgery, or the utterance of forged paper, committed within the jurisdiction of either, shall seek an asylum, or shall be found within the territories of the other: *Provided*, That this shall only be done upon such evidence of criminality as, according to the laws of the place where the fugitive or person so charged shall be found, would justify his apprehension and commitment for trial if the crime or offense had there been committed; and the respective judges and other magistrates of the two Governments shall have power, jurisdiction and authority, upon complaint made under oath, to issue a warrant for the apprehension of the fugitive or person so charged, that he may be brought before such judges or other magistrates, respectively, to the end that the evidence of criminality may be heard and considered, and if, on such hearing, the evidence be deemed sufficient to sustain the charge, it shall be the duty of the examining judge or magistrate to certify the same to the proper executive authority, that a warrant may issue for the surrender of such fugitive. The expense of such apprehension and delivery shall be borne and defrayed by the party who makes the requisition and receives the fugitive.

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### II. FRANCE, NOVEMBER 9, 1843.

The United States of America and His Majesty, the King of the French, having judged it expedient, with a view to the better administration of

justice, and to the prevention of crime within their respective territories and jurisdictions, that persons charged with the crimes hereinafter enumerated and being fugitives from justice, should, under certain circumstances, be reciprocally delivered up, the said United States of America and His Majesty, the King of the French, have named as their Plenipotentiaries to conclude a convention for this purpose:

That is to say, the President of the United States of America, Abel P. Upshur, Secretary of State of the United States, and His Majesty, the King of the French, the Sieur Pageot, Officer of the Royal Order of the Legion of Honor, his Minister Plenipotentiary, *ad interim*, in the United States of America:

Who, after having communicated with each other their respective full powers, found in good and due form, have agreed upon and concluded the following articles:

ARTICLE I. It is agreed that the high contracting parties shall, on requisitions made in their name, through the medium of their respective diplomatic agents, deliver up to justice persons who, being accused of the crimes enumerated in the next following article, committed within the jurisdiction of the requiring party, shall seek an asylum, or shall be found within the territories of the other: *Provided*, That this shall be done only when the fact of the commission of the crime shall be so established as that the laws of the country in which the fugitive or the person so accused shall be found, would justify his or her apprehension and commitment for trial, if the crime had been there committed.

ART. II. Persons shall be so delivered up who shall be charged, according to the provisions of this convention, with any of the following crimes, to-wit: Murder (comprehending the crimes designated in the French Penal Code by the terms assassination, parricide, infanticide and poisoning), or with an attempt to commit murder, or with rape, or with forgery, or with arson, or with embezzlement by public officers, when the same is punishable with infamous punishment.

ART. III. On the part of the French Government, the surrender shall be made only by the authority of the Keeper of the Seals, Minister of Justice; and on the part of the Government of the United States, the surrender shall be made only by authority of the Executive thereof.

ART. IV. The expenses of any detention and delivery effected in virtue of the preceding provisions shall be borne and defrayed by the Government in whose name the requisition shall have been made.

ART. V. The provisions of the present convention shall not be applied in any manner to the crimes enumerated in the second article, committed anterior to the date thereof, nor to any crime or offense of a purely political character.

ART. VI. This convention shall continue in force until it shall be abrogated by the contracting parties, or one of them, but it shall not be abrogated,

except by mutual consent, unless the party desiring to abrogate it shall give six months's previous notice of his intention to do so. It shall be ratified, and the ratifications shall be exchanged within the space of six months, or earlier if possible.

In witness whereof, the respective Plenipotentiaries have signed the present convention in duplicate, and have affixed thereto the seal of their arms.

Done at Washington the ninth day of November, Anno Domini one thousand eight hundred and forty-three.

A. P. UPSHUR. [L. s.]

A. PAGEOT. [L. s.]

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ADDITIONAL ARTICLE, FEBRUARY 24, 1845.—The crime of robbery, defining the same to be the felonious and forcible taking from the person of another, of goods or money to any value, by violence or putting him in fear ; and the crime of burglary, defining the same to be, breaking and entering by night into a mansion-house of another, with intent to commit felony, and the corresponding crimes included under the French law in the words *vol qualifié crime*, not being embraced in the second article of the convention of extradition concluded between the United States of America and France, on the ninth of November, 1843, it is agreed by the present article, between the high contracting parties, that persons charged with those crimes shall be respectively delivered up, in conformity with the first article of the said convention ; and the present article, when ratified by the parties, shall constitute a part of the said convention, and shall have the same force as if it had been originally inserted in the same.

In witness whereof, the respective Plenipotentiaries have signed the present article in duplicate, and have affixed thereto the seal of their arms.

Done at Washington this twenty-fourth day of February, 1845.

J. C. CALHOUN. [L. s.]

A. PAGEOT. [L. s.]

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ADDITIONAL ARTICLE, FEBRUARY 10, 1858.—It is agreed between the high contracting parties that the provisions of the treaties for the mutual extradition of criminals between the United States of America and France, of November 9, 1843, and February 24, 1845, and now in force between the two Governments, shall extend not only to persons charged with the crimes therein mentioned, but also to persons charged with the following crimes, whether as principals, accessories, or accomplices, namely: Forging or knowingly passing or putting in circulation counterfeit coin or bank notes or other paper current as money, with intent to defraud any person or persons; embezzlement by any person or persons hired or salaried to the

detriment of their employers, when these crimes are subject to infamous punishment.

In witness whereof, the respective Plenipotentiaries have signed the present article in triplicate, and have affixed thereto the seal of their arms.

Done at Washington the tenth of February, 1858.

LEW. CASS. [SEAL.]

SARTIGES. [SEAL.]

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### III. HAWAIIAN ISLANDS, DECEMBER 20, 1849.

ARTICLE XIV. The contracting parties mutually agree to surrender upon official requisition to the authorities of each, all persons who being charged with the crimes of murder, piracy, arson, robbery, forgery or the utterance of forged paper, committed within the jurisdiction of either, shall be found within the territories of the other: *Provided*, That this shall only be done upon such evidence of criminality as, according to the laws of the place where the person so charged shall be found, would justify his apprehension and commitment for trial if the crime had there been committed. And the respective judges and other magistrates of the two governments shall have authority upon complaint made under oath, to issue a warrant for the apprehension of the person so charged, that he may be brought before such judges or other magistrates respectively, to the end that the evidence of criminality may be heard and considered; and if, on such hearing, the evidence be deemed sufficient to sustain the charge, it shall be the duty of the examining judge or magistrate to certify the same to the proper executive authority that a warrant may issue for the surrender of such fugitive. The expense of such apprehension and delivery shall be borne and defrayed by the party who makes the requisition and receives the fugitive.

ART. XVII. The present treaty shall be ratified by the President of the United States of America, by and with the advice and consent of the Senate of said States, and by His Majesty, the King of the Hawaiian Islands, by and with the advice of his Privy Council of State, and the ratifications shall be exchanged at Honolulu within eighteen months from the date of its signature, or sooner if possible.

In witness whereof, the respective Plenipotentiaries have signed the same in triplicate and have hereto affixed their seals.

Done at Washington in the English language, the twentieth day of December, in the year one thousand eight hundred and forty-nine.

JOHN M. CLAYTON. [SEAL.]

JAMES JACKSON JARVES. [SEAL.]

## IV. SWISS CONFEDERATION, NOVEMBER 25, 1850.

ARTICLE XIII. The United States of America and the Swiss Confederation, on requisitions made in their name through the medium of their respective diplomatic or consular agents, shall deliver up to justice persons who, being charged with the crimes enumerated in the following article committed within the jurisdiction of the requiring party, shall seek asylum or shall be found within the territories of the other: *Provided*, That this shall be done only when the fact of the commission of the crime shall be so established as to justify their apprehension and commitment for trial if the crime had been committed in the country where the persons so accused shall be found.

ART. XIV. Persons shall be delivered up according to the provisions of this convention, who shall be charged with any of the following crimes, to-wit: murder (including assassination, parricide, infanticide and poisoning), attempt to commit murder, rape, forgery or the emission of forged papers, arson, robbery with violence, intimidation or forcible entry of an inhabited house, piracy, embezzlement by public officers, or by persons hired or salaried to the detriment of their employers, when these crimes are subject to infamous punishment.

ART. XV. On the part of the United States, the surrender shall be made only by the authority of the Executive thereof, and on the part of the Swiss Confederation by that of the Federal Council.

ART. XVI. The expenses of detention and delivery effected in virtue of the preceding articles shall be at the cost of the party making the demand.

ART. XVII. The provisions of the foregoing articles relating to the surrender of fugitive criminals shall not apply to offenses committed before the date hereof, nor to those of a political character.

ART. XVIII. The present convention is concluded for the period of ten years, counting from the day of the exchange of the ratifications, and if, one year before the expiration of that period, neither of the contracting parties shall have announced by an official notification its intention to the other to arrest the operations of said convention, it shall continue binding for twelve months longer, and so on from year to year, until the expiration of the twelve months which will follow a similar declaration, whatever the time at which it may take place.

ART. XIX. This convention shall be submitted, on both sides, to the approval and ratification of the respective, competent authorities of each of the contracting parties, and the ratifications shall be exchanged at the city of Washington as soon as circumstances shall admit.

In faith whereof, the respective Plenipotentiaries have signed the above articles, under reserve of the above-mentioned ratifications, both in the English and French languages, and they have thereunto affixed their seals,



Done in quadruplicate, at the city of Berne, this twenty-fifth day of November, in the year of our Lord one thousand eight hundred and fifty.

A. DUDLEY MANN. [L. s.]

H. DRUEY. [L. s.]

F. FREY HÉROSÉE. [L. s.]

#### V. PRUSSIA AND OTHER STATES, JUNE 16, 1852.

Whereas it is found expedient, for the better administration of justice, and the prevention of crime within the territories and jurisdiction of the parties respectively, that persons committing certain heinous crimes, being fugitives from justice, should, under certain circumstances, be reciprocally delivered up, and also to enumerate such crimes explicitly; and, whereas the laws and constitution of Prussia, and of the other German States, parties to this convention, forbid them to surrender their own citizens to a foreign jurisdiction, the Government of the United States, with a view of making the convention strictly reciprocal, shall be held equally free from any obligation to surrender citizens of the United States: Therefore, on the one part, the United States of America, and, on the other part, His Majesty the King of Prussia, in his own name, as well as in the name of His Majesty the King of Saxony, His Royal Highness the Elector of Hesse, His Royal Highness the Grand Duke of Hesse and on Rhine, His Royal Highness the Grand Duke of Saxe-Weimar-Eisenach, His Highness the Duke of Saxe-Meiningen, His Highness the Duke of Saxe-Altenburg, His Highness the Duke of Saxe-Coburg-Gotha, His Highness the Duke of Brunswick, His Highness the Duke of Anhalt-Dessau, His Highness the Duke of Anhalt-Bernburg, His Highness the Duke of Nassau, His Serene Highness the Prince of Schwarzburg-Rudolstadt, His Serene Highness the Prince of Schwarzburg-Sondershausen, Her Serene Highness the Princess and Regent of Waldeck, His Serene Highness the Prince of Reuss, elder branch, His Serene Highness the Prince of Reuss, junior branch, His Serene Highness the Prince of Lippe, His Serene Highness the Landgrave of Hesse-Homburg, as well as the free city of Frankfort, having resolved to treat on this subject, have for that purpose appointed their respective Plenipotentiaries to negotiate and conclude a convention, that is to say:

The President of the United States of America, Daniel Webster, Secretary of State, and His Majesty the King of Prussia, in his own name, as well as in the name of the other German Sovereigns above enumerated, and the free city of Frankfort, Frederic Charles Joseph von Gerolt, His said Majesty's Minister resident near the Government of the United States;

Who, after reciprocal communication of their respective powers, have agreed to and signed the following articles:

ARTICLE I. It is agreed that the United States and Prussia, and the other States of the Germanic Confederation, included in or which may

hereafter accede to this convention, shall, upon mutual requisitions by them or their ministers, officers, or authorities, respectively made, deliver up to justice all persons who being charged with the crime of murder, or assault with intent to commit murder, or piracy, or arson, or robbery, or forgery, or the utterance of forged papers, or the fabrication or circulation of counterfeit money, whether coin or paper money, or the embezzlement of public moneys, committed within the jurisdiction of either party, shall seek an asylum, or shall be found within the territories of the other: *Provided*, That this shall only be done upon such evidence of criminality as, according to the laws of the place where the fugitive or person so charged shall be found, would justify his apprehension and commitment for trial, if the crime or offense had there been committed; and the respective judges and other magistrates of the two governments shall have power, jurisdiction and authority, upon complaint made under oath, to issue a warrant for the apprehension of the fugitive or person so charged, that he may be brought before such judges or other magistrates, respectively, to the end that the evidence of criminality may be heard and considered; and if, on such hearing the evidence be deemed sufficient to sustain the charge, it shall be the duty of the examining judge or magistrate to certify the same to the proper executive authority, that a warrant may issue for the surrender of such fugitive. The expense of such apprehension and delivery shall be borne and defrayed by the party who makes the requisition and receives the fugitive.

ART. II. The stipulations of this convention shall be applied to any other State of the Germanic Confederation, which may hereafter declare its accession thereto.

ART. III. None of the contracting parties shall be bound to deliver up its own citizens or subjects under the stipulations of this convention.

ART. IV. Whenever any person accused of any of the crimes enumerated in this convention shall have committed a new crime in the territories of the State where he has sought an asylum, or shall be found, such person shall not be delivered up under the stipulations of this convention until he shall have been tried, and shall have received the punishment due to such new crime, or shall have been acquitted thereof.

ART. V. The present convention shall continue in force until the 1st of January, 1858, and if neither party shall have given to the other six months' previous notice of its intention then to terminate the same, it shall further remain in force until the end of twelve months after either of the high contracting parties shall have given notice to the other of such intention; each of the high contracting parties reserving to itself the right of giving such notice to the other, at any time after the expiration of the said first day of January, 1858.

ART. VI. The present convention shall be ratified by the President, by and with the advice and consent of the Senate of the United States, and by

the Government of Prussia, and the ratifications shall be exchanged at Washington within six months from the date hereof, or sooner if possible.

In faith whereof, we, the respective Plenipotentiaries have signed this convention, and have hereunto affixed our seals.

Done in triplicate at Washington, the sixteenth day of June, one thousand eight hundred and fifty-two, and the seventy-sixth year of the Independence of the United States.

DAN'L WEBSTER. [L. s.]

FR. v. GEROLT. [L. s.]

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ADDITIONAL ARTICLE, NOVEMBER 16, 1852. — Whereas it may not be practicable for the ratifications of the convention for the mutual delivery of criminals, fugitives from justice, in certain cases, between the United States and Prussia and other States of the Germanic Confederation, signed at Washington on the 16th day of June, 1852, to be exchanged within the time stipulated in said convention; and whereas both parties are desirous that it should be carried into full and complete effect: The President of the United States of America has fully empowered on his part Edward Everett, Secretary of State of the United States, and His Majesty the King of Prussia, in his own name, as well as in the name of the other German Sovereigns enumerated in the aforesaid convention, has likewise fully empowered Frederick Charles Joseph von Gerolt, his said Majesty's Minister Resident near the Government of the United States; who have agreed to and signed the following article:

The ratifications of the convention for the mutual delivery of criminals, fugitives from justice, in certain cases, concluded on the 16th of June, 1852, shall be exchanged at Washington within one year from the date of this agreement, or sooner should it be possible.

The present additional article shall have the same force and effect as if it had been inserted, word for word, in the aforesaid convention of June 16, 1852, and shall be approved and ratified in the manner therein prescribed.

In faith whereof, we, the respective Plenipotentiaries, have signed this agreement, and have hereunto affixed our seals.

Done at Washington this sixteenth day of November, one thousand eight hundred and fifty-two, and in the seventy-seventh year of the Independence of the United States.

EDWARD EVERETT. [L. s.]

FR. v. GEROLT. [L. s.]

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#### VI. BREMEN, SEPTEMBER 6, 1853.

Whereas a convention for the mutual delivery of criminals, fugitives from justice, in certain cases, between Prussia and other States of the Germanic Confederation, on the one part, and the United States of North America on the other part, was concluded at Washington, on the 16th of

June, 1852, by the Plenipotentiaries of the contracting parties, and was subsequently duly ratified on the part of the contracting governments; and whereas, pursuant to the second article of the said convention, the United States have agreed that the stipulations of the said convention shall be applied to any other State of the Germanic Confederation which might subsequently declare its accession thereto: Therefore the Senate of the free Hanseatic city of Bremen accordingly hereby declares their accession to the said convention of June 16, 1852, which is literally as follows:

[A copy of the convention of June 16, 1852, between the United States and Prussia and other Germanic States, is here inserted.]

And hereby expressly promises that all and every one of the articles and provisions contained in the said convention shall be faithfully observed and executed within the dominion of the free Hanseatic city of Bremen.

In faith whereof, the President of the Senate has executed the present declaration of accession, and has caused the great seal of Bremen to be affixed to the same.

Done at Bremen the sixth day of September, eighteen hundred and fifty-three.

The President of the Senate,

SMIDT.

BREULS, *Secr.*

[SEAL.]

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#### VII. BAVARIA, SEPTEMBER 12, 1853.

The United States of America and His Majesty the King of Bavaria, actuated by an equal desire to further the administration of justice, and to prevent the commission of crimes in their respective countries, taking into consideration that the increased means of communication between Europe and America facilitate the escape of offenders, and that, consequently, provision ought to be made in order that the ends of justice shall not be defeated, have determined to conclude an arrangement destined to regulate the course to be observed in all cases with reference to the extradition of such individuals as, having committed any of the offenses hereafter enumerated, in one country, shall have taken refuge within the territories of the other. The constitution and laws of Bavaria, however, not allowing the Bavarian Government to surrender their own subjects for trial before a foreign court of justice, a strict reciprocity requires that the Government of the United States shall be held equally free from any obligation to surrender citizens of the United States. For which purposes the high contracting powers have appointed as their Plenipotentiaries:

The President of the United States, James Buchanan, Envoy Extraordinary and Minister Plenipotentiary of the United States at the court of the United Kingdom of Great Britain and Ireland; His Majesty the King of Bavaria, Augustus Baron De Cetto, his said Majesty's Chamberlain, Envoy Extraordinary and Minister Plenipotentiary at the court of Her Majesty

the Queen of the United Kingdom of Great Britain and Ireland, Knight Commander of the Order for Merit of the Bavarian Crown, and of the Order for Merit of St. Michael, Knight Grand Cross of the Royal Grecian Order of our Saviour:

Who, after reciprocal communication of their respective full powers, found in good and due form, have agreed to the following articles:

ARTICLE I. The Government of the United States and the Bavarian Government promise and engage, upon mutual requisitions by them or their ministers, officers or authorities, respectively made, to deliver up to justice all persons who, being charged with the crime of murder, or assault with intent to commit murder, or piracy, or arson, or robbery, or forgery, or the utterance of forged papers, or the fabrication or circulation of counterfeit money, whether coin or paper money, or the embezzlement of public moneys, committed within the jurisdiction of either party, shall seek an asylum, or shall be found within the territories of the other: *Provided*, That this shall only be done upon such evidence of criminality as, according to the laws of the place where the fugitive or person so charged shall be found, would justify his apprehension and commitment for trial, if the crime or offense had there been committed: and the respective judges and other magistrates of the two governments shall have power, jurisdiction and authority, upon complaint made under oath, to issue a warrant for the apprehension of the fugitive or person so charged, that he may be brought before such judges or other magistrates, respectively, to the end that the evidence of criminality may be heard and considered; and if, on such hearing, the evidence be deemed sufficient to sustain the charge, it shall be the duty of the examining judge or magistrate to certify the same to the proper executive authority, that a warrant may issue for the surrender of such fugitive. The expense of such apprehension and delivery shall be borne and defrayed by the party who makes the requisition and receives the fugitive.

ART. II. The stipulations of this convention shall be applied to any other State of the German Confederation which may hereafter declare its accession thereto.

ART. III. None of the contracting parties shall be bound to deliver up its own citizens or subjects under the stipulations of this convention.

ART. IV. Whenever any person accused of any of the crimes enumerated in this convention shall have committed a new crime in the territories of the State where he has sought an asylum or shall be found, such person shall not be delivered up under the stipulations of this convention until he shall have been tried and shall have received the punishment due to such new crime, or shall have been acquitted thereof.

ART. V. The present convention shall continue in force until the first of January, one thousand eight hundred and fifty-eight; and if neither party shall have given to the other six months' previous notice of its intention then to terminate the same, it shall further remain in force until the end

of twelve months after either of the high contracting parties shall have given notice to the other of such intention; each of the high contracting parties reserving to itself the right of giving such notice to the other at any time after the expiration of the said first day of January, one thousand eight hundred and fifty-eight.

ART. VI. The present convention shall be ratified by the President, by and with the advice and consent of the Senate of the United States, and by the Government of Bavaria, and the ratifications shall be exchanged in London within fifteen months from the date hereof, or sooner if possible.

In faith whereof, the respective Plenipotentiaries have signed this convention, and have hereunto affixed their seals.

Done in duplicate, in London, the twelfth day of September, one thousand eight hundred and fifty-three, and the seventy-eighth year of the Independence of the United States.

JAMES BUCHANAN. [L. s.]  
AUG. DE CETTO. [L. s.]

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VIII. WURTEMBERG, OCTOBER 13, 1853.

[On the 13th of October, 1853, the Government of His Majesty, the King of Wurtemberg, formally declared its accession to the convention of the 16th of June, 1852, between the United States and Prussia and other States of the Germanic Confederation, for the mutual delivery of criminals, fugitives from justice, in certain cases. See that convention.]

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IX. MECKLENBURG-SCHWERIN, NOVEMBER, 26, 1853.

Whereas, a treaty for the reciprocal extradition of fugitive criminals, in special cases, was concluded between Prussia and other States of the Germanic Confederation on the one hand, and the United States of North America on the other, under date of June 16, 1852, at Washington, by the Plenipotentiaries of the contracting parties, and has been ratified by the contracting Governments; and whereas, in the second article of the same, the United States of North America have declared that they agree that the stipulations of the aforesaid treaty shall be applicable to every other State of the Germanic Confederation which shall have subsequently declared its accession to the treaty: Now, therefore, in accordance therewith, the Government of His Royal Highness the Grand Duke of Mecklenburg-Schwerin hereby declares, through the undersigned Grand Ducal Minister of foreign affairs, its accession to the aforesaid treaty of June 16, 1852, which is word for word, as follows:

[The original declaration here includes a copy, in German and English, of the treaty of June 16, 1852, and of the additional article thereto of November 16, 1852.]

And hereby expressly gives assurance that each and every article and stipulation of this treaty shall be faithfully observed and enforced within the territory of the Grand Duchy of Mecklenburg-Schwerin.

In testimony whereof, the Grand Ducal Minister of Foreign Affairs, in the name of His Royal Highness the Grand Duke of Mecklenburg-Schwerin, has executed this declaration of accession, and caused the ministerial seal to be thereunto affixed.

Done at Schwerin, November 26, 1853.

[SEAL.]

GR. v. BULOW,

*Grand Ducal Minister of Foreign Affairs of Mecklenburg-Schwerin.*

#### X. MECKLENBURG-STRELITZ, DECEMBER 2, 1853.

Whereas a treaty for the reciprocal extradition of fugitive criminals, in special cases, was concluded between Prussia and other States of the Germanic Confederation on the one hand, and the United States of North America on the other, under date of June 16, 1852, at Washington, by the Plenipotentiaries of the contracting parties, and has been ratified by the contracting Governments; and whereas, in the second article of the same, the United States of North America have declared that they agree that the stipulations of the aforesaid treaty shall be applicable to every other State of the Germanic Confederation which shall have subsequently declared its accession to the treaty: Now, therefore, in accordance therewith, the Government of His Royal Highness the Grand Duke of Mecklenburg-Strelitz hereby declares its accession to the aforesaid treaty of June 16, 1852, which is, word for word, as follows:

[The original declaration here includes a copy, in German, of the treaty of June 16, 1852.]

And hereby expressly gives assurance that each and every article and stipulation of this treaty shall be faithfully observed and enforced within the territory of the Grand Duchy of Mecklenburg-Strelitz.

In testimony whereof, the undersigned Grand Ducal Minister of State, in the name of His Royal Highness the Grand Duke of Mecklenburg-Strelitz, has executed this declaration of accession, and caused the seal of the Grand Ducal Ministry of State to be thereunto affixed.

Done at Neustrelitz, the 2d day of December, 1853.

[SEAL.]

P. v. KANDORFF,

*Grand Ducal Minister of State.*  
DRISCHOW.

#### XI. OLDENBURG, DECEMBER 30, 1853.

Whereas a treaty for the reciprocal extradition of fugitive criminals, in special cases, was concluded between Prussia and other States of the Germanic Confederation on the one hand, and the United States of North

America on the other, under the date of June 16, 1852, at Washington, by the Plenipotentiaries of the contracting parties, and has been ratified by the contracting Governments; and whereas, in the second article of the same, the United States of North America have declared that they agree that the stipulations of the aforesaid treaty shall be applicable to every other State of the Germanic Confederation which shall have subsequently declared its accession to the treaty: Now, therefore, in accordance therewith, the Government of His Royal Highness the Grand Duke of Oldenburg hereby declares its accession to the aforesaid treaty of June 16, 1852, which is, word for word, as follows:

[The original declaration here includes a copy, in German, of the treaty of June 16, 1852, and of the additional article thereto of November 16, 1852.]

And hereby expressly gives assurance that each and every article and stipulation of this treaty shall be faithfully observed and enforced within the territory of the Grand Duchy of Oldenburg.

In testimony whereof, the Grand Ducal Minister of State of Oldenburg, in the name of His Royal Highness the Grand Duke of Oldenburg, has executed the present declaration of accession, and caused the Ministerial seal to be affixed thereto.

Done at Oldenburg, December 30, one thousand eight hundred and fifty-three.

[L. s.]

VON ROSSING,

*Grand Ducal Minister of State of Oldenburg.*

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## XII. SCHAUMBURG-LIPPE, JUNE 7, 1854.

Whereas, a treaty for the reciprocal extradition of fugitive criminals, in special cases, was concluded between Prussia and other States of the Germanic Confederation on the one hand, and the United States of North America on the other, under date of June 16, 1852, at Washington, by the Plenipotentiaries of the contracting parties, and has been ratified by the contracting Governments; and, whereas, in the second article of the same, the United States of North America have declared that they agree that the stipulations of the aforesaid treaty shall be applicable to any other State of the Germanic Confederation which shall have subsequently declared its accession to the treaty: Now therefore, in accordance therewith, the Government of His Serene Highness the Reigning Prince of Schaumburg-Lippe, hereby declares its accession to the aforesaid treaty of June 16, 1852, which is word for word, as follows:

[The original declaration here includes a copy, in German and English, of the treaty of June 16, 1852, and of the additional article thereto of November 16, 1852.]

And hereby expressly gives assurance that each and every article and stipulation of this treaty shall be faithfully observed and enforced within the territory of the Principality of Schaumburg-Lippe.



In testimony whereof, the Government of the Prince, in the name of His Serene Highness the Reigning Prince of Schaumburg-Lippe, has executed the present declaration of accession, and caused the seal of the Government to be thereunto affixed.

Done at Buckeburg, the seventh day of June, one thousand eight hundred and fifty-four.

The Government of the Prince of Schaumburg-Lippe.

[SEAL.]

v. SAUER.  
WERNER.

### XIII. HANOVER, JANUARY 18, 1855.

The United States of America and His Majesty the King of Hanover, actuated by an equal desire to further the administration of justice, and to prevent the commission of crime in their respective countries, taking into consideration that the increased means of communication between Europe and America facilitate the escape of offenders, and that consequently provision ought to be made in order that the ends of justice shall not be defeated, have determined to conclude an arrangement destined to regulate the course to be observed in all cases with reference to the extradition of such individuals as, having committed any of the offenses hereafter enumerated in one country, shall have taken refuge within the territories of the other. The Constitution and Laws of Hanover, however, not allowing the Hanoverian Government to surrender their own subjects for trial before a foreign court of justice, a strict reciprocity requires that the Government of the United States shall be held equally free from any obligation to surrender citizens of the United States. For which purposes the high contracting powers have appointed as their Plenipotentiaries:

The President of the United States, James Buchanan, Envoy Extraordinary and Minister Plenipotentiary of the United States at the Court of the United Kingdom of Great Britain and Ireland; His Majesty the King of Hanover, the Count Adolphus von Kielmansegge, His Envoy Extraordinary and Minister Plenipotentiary to Her Britannic Majesty, Grand Cross of the Order of the Guelphs, etc., etc.:

Who, after reciprocal communication of their respective full powers, found in good and due form, have agreed to the following articles:

ARTICLE I. The Government of the United States and the Hanoverian Government promise and engage, upon mutual requisitions by them, or their ministers, officers or authorities, respectively made, to deliver up to justice all persons who, being charged with the crime of murder, or assault with intent to commit murder, or piracy, or arson, or robbery, or forgery, or the utterance of forged papers, or the fabrication or circulation of counterfeit money, whether coin or paper money, or the embezzlement of public moneys, committed within the jurisdiction of either party shall seek an asylum, or shall be found within the territories of the other: *Provided*, That this shall only be done upon such evidence of criminality as,

according to the laws of the place where the fugitive or person so charged shall be found, would justify his apprehension and commitment for trial, if the crime or offense had there been committed; and the respective judges and other magistrates of the two Governments shall have power, jurisdiction and authority, upon complaint made under oath, to issue a warrant for the apprehension of the fugitive or person so charged, that he may be brought before such judges or other magistrates, respectively, to the end that the evidence of criminality may be heard and considered; and if, on such hearing, the evidence be deemed sufficient to sustain the charge, it shall be the duty of the examining judge or magistrate to certify the same to the proper executive authority, that a warrant may issue for the surrender of such fugitive. The expense of such apprehension and delivery shall be borne and defrayed by the party who makes the requisition and receives the fugitive.

ART. II. The stipulations of this convention shall be applied to any other State of the Germanic Confederation which may hereafter declare its accession thereto.

ART. III. None of the contracting parties shall be bound to deliver up its own subjects or citizens under the stipulations of this convention.

ART. IV. Whenever any person accused of any of the crimes enumerated in this convention shall have committed a new crime in the territories of the State where he has sought an asylum, or shall be found, such person shall not be delivered up, under the stipulations of this convention, until he shall have been tried and shall have received the punishment due to such new crime, or shall have been acquitted thereof.

ART. V. The present convention shall continue in force until the first of January, one thousand eight hundred and fifty-eight; and if neither party shall have given to the other six months' previous notice of its intention then to terminate the same, it shall further remain in force until the end of twelve months after either of the high contracting parties shall have given notice to the other of such intention; each of the high contracting parties reserving to itself the right of giving such notice to the other at any time after the expiration of the said first day of January, one thousand eight hundred and fifty-eight.

ART. VI. The present convention shall be ratified by the President, by and with the advice and consent of the Senate of the United States, and by the Government of Hanover, and the ratifications shall be exchanged in London within three months from the date hereof, or sooner if possible.

In faith whereof, the respective Plenipotentiaries have signed this convention, and have hereunto affixed their seals.

Done in duplicate in London, the eighteenth day of January, one thousand eight hundred and fifty-five, and the seventy-ninth year of the Independence of the United States.

JAMES BUCHANAN. [L. S.]  
A. KIELMANSEGGE. [L. S.]

## XIV. TWO SICILIES, OCTOBER 1, 1855.

ARTICLE XXI. It is agreed that every person who, being charged with or condemned for any of the crimes enumerated in the following article, committed within the States of one of the high contracting parties, shall seek asylum in the States or on board the vessels of war of the other party, shall be arrested and consigned to justice on demand made, through the proper diplomatic channel, by the government within whose territory the offense shall have been committed. This surrender and delivery shall not, however, be obligatory on either of the high contracting parties until the other shall have presented a copy of the judicial declaration or sentence establishing the culpability of the fugitive, in case such sentence or declaration shall have been pronounced. But if such sentence or declaration shall not have been pronounced, then the surrender may be demanded, and shall be made, when the demanding Government shall have furnished such proof as would have been sufficient to justify the apprehension and commitment for trial, of the accused, if the offense had been committed in the country where he shall have taken refuge.

ART. XXII. Persons shall be delivered up according to the provisions of this treaty, who shall be charged with any of the following crimes, to-wit:

Murder (including assassination, parricide, infanticide, and poisoning); attempt to commit murder; rape; piracy; arson; the making and uttering of false money, forgery, including forgery of evidences of public debt, bank bills and bills of exchange; robbery with violence, intimidation or forcible entry of an inhabited house; embezzlement by public officers, including appropriation of public funds; when these crimes are subject, by the code of the Kingdom of the Two Sicilies, to the punishment *della reclusione*, or other severe punishment, and by the laws of the United States to infamous punishment.

ART. XXIII. On the part of each country, the surrender of fugitives from justice shall be made only by the authority of the Executive thereof. And all expenses whatever of detention and delivery, effected in virtue of the preceding articles, shall be at the cost of the party making the demand.

ART. XXIV. The citizens and subjects of each of the high contracting parties shall remain exempt from the stipulations of the preceding articles, so far as they relate to the surrender of fugitive criminals; nor shall they apply to offenses committed before the date of the present treaty, nor to offenses of a political character, unless the political offender shall also have been guilty of some one of the crimes enumerated in Article XXII.

ART. XXV. The present treaty shall take effect from the day in which ratifications shall be exchanged, and shall remain in force for the term of ten years, and further until the end of twelve months after either of the high contracting parties shall have given notice to the other of its intention to terminate the same; each of the said contracting parties reserving to itself the right to give such notice at the end of said term of ten years, or at any subsequent time.

ART. XXVI. The present treaty shall be approved and ratified by the President of the United States of America, by and with the advice and consent of the Senate thereof, and by His Majesty the King of the Kingdom of the Two Sicilies; and the ratifications shall be exchanged at Naples within twelve months from the date of its signature, or sooner if possible.

In faith whereof, the respective Plenipotentiaries have signed the foregoing articles in the English and Italian languages, and have hereunto affixed the seals of their arms.

Done in duplicate, at the city of Naples, the first day of October, in the year of our Lord one thousand eight hundred and fifty-five.

ROBERT DALE OWEN.	[L. s.]
LUIGI CARAFA.	[L. s.]
PRINCIPE DI COMITINI.	[L. s.]
GUISEPPE MARIO ARPINO.	[L. s.]

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XV. AUSTRIA, JULY 3, 1856.

Whereas it is found expedient for the better administration of justice and the prevention of crime within the territories and jurisdiction of the parties, respectively, that persons committing certain heinous crimes, being fugitives from justice, should, under certain circumstances, be reciprocally delivered up, and also to enumerate such crimes explicitly; and whereas the laws of Austria forbid the surrender of its own citizens to a foreign jurisdiction, the Government of the United States, with a view of making the convention strictly reciprocal, shall be held equally free from any obligation to surrender citizens of the United States: Therefore, on the one part, the United States of America, and on the other part, His Majesty the Emperor of Austria, having resolved to treat on this subject, have for that purpose appointed their respective Plenipotentiaries, to negotiate and conclude a convention, that is to say:

The President of the United States, William L. Marcy, Secretary of State and His Majesty the Emperor of Austria, John George Chevalier de Hulsemann, His said Majesty's Minister Resident near the Government of the United States;

Who, after reciprocal communication of their respective powers, have agreed to and signed the following articles:

ARTICLE I. It is agreed that the United States and Austria shall upon mutual requisitions by them or their ministers, officers or authorities, respectively made, deliver up to justice all persons who, being charged with the crime of murder, or assault with intent to commit murder, or piracy, or arson, or robbery, or forgery, or the fabrication or circulation of counterfeit money, whether coin or paper money, or the embezzlement of public moneys, committed within the jurisdiction of either party, shall seek an asylum, or shall be found within the territories of the other: *Provided*, That this shall only be done upon such evidence of criminality as according to

the laws of the place where the fugitive or person so charged shall be found, would justify his apprehension and commitment for trial, if the crime or offense had there been committed; and the respective judges and other magistrates of the two Governments shall have power, jurisdiction, and authority, upon complaint made under oath, to issue a warrant for the apprehension of the fugitive or person so charged, that he may be brought before such judges or other magistrates, respectively, to the end that the evidence of criminality may be heard and considered; and if, on such hearing, the evidence be deemed sufficient to sustain the charge, it shall be the duty of the examining judge or magistrate to certify the same to the proper executive authority, that a warrant may issue for the surrender of such fugitive. The expense of such apprehension and delivery shall be borne and defrayed by the party who makes the requisition and receives the fugitive. The provisions of the present convention shall not be applied, in any manner, to the crimes enumerated in the first article committed anterior to the date thereof; nor to any crime or offense of a political character.

ART. II. Neither of the contracting parties shall be bound to deliver up its own citizens or subjects under the stipulations of this convention.

ART. III. Whenever any person accused of any of the crimes enumerated in this convention shall have committed a new crime in the territories of the State where he has sought an asylum, or shall be found, such person shall not be delivered up, under the stipulations of this convention, until he shall have been tried and shall have received the punishment due to such new crime, or shall have been acquitted thereof.

ART. IV. The present convention shall continue in force until the first of January, 1858; and if neither party shall have given to the other six months' previous notice of its intention then to terminate the same, it shall further remain in force until the end of twelve months after either of the high contracting parties shall have given notice to the other of such intention; each of the high contracting parties reserving to itself the right of giving such notice to the other at any time after the expiration of the said first day of January, 1858.

ART. V. The present convention shall be ratified by the President, by and with the advice and consent of the Senate of the United States, and by His Majesty the Emperor of Austria, and the ratifications shall be exchanged at Washington within six months from the date hereof, or sooner if possible.

In faith whereof, the respective Plenipotentiaries have signed this convention, and have hereunto affixed their seals.

Done in duplicate at Washington, the third day of July, in the year of our Lord one thousand eight hundred and fifty-six, and of the Independence of the United States the eightieth.

[L. S.]

[L. S.]

W. L. MARCY.  
HULSEMANN.

## XVI. BADEN, JANUARY 30, 1857.

Whereas it is found expedient, for the better administration of justice and the prevention of crime within the territories and jurisdiction of the parties, respectively, that persons committing certain heinous crimes, being fugitives from justice, should, under certain circumstances, be reciprocally delivered up; and also to enumerate such crimes explicitly; and whereas the laws and constitution of Baden do not allow its Government to surrender its own citizens to a foreign jurisdiction, the Government of the United States, with a view of making the convention strictly reciprocal, shall be held equally free from any obligation to surrender citizens of the United States: Therefore, on the one part the United States of America, and on the other part His Royal Highness the Grand Duke of Baden, having resolved to treat on this subject, have, for that purpose, appointed their respective Plenipotentiaries to negotiate and conclude a convention, that is to say:

The President of the United States of America, Peter D. Vroom, Envoy Extraordinary and Minister Plenipotentiary of the United States at the Court of the Kingdom of Prussia; and His Royal Highness the Grand Duke of Baden, Adolph, Baron Marschall de Bieberstein, His said Royal Highness' Envoy Extraordinary and Minister Plenipotentiary, at the Court of His Majesty the King of Prussia, etc., etc.;

Who, after reciprocal communication of their respective powers, have agreed to and signed the following articles:

ARTICLE I. It is agreed that the United States and Baden shall, upon mutual requisitions by them, or their ministers, officers, or authorities, respectively made, deliver up to justice all persons who, being charged with the crime of murder, or assault with intent to commit murder, or piracy, or arson, or robbery, or forgery, or the fabrication or circulation of counterfeit money, whether coin or paper money, or the embezzlement of public moneys, committed within the jurisdiction of either party, shall seek an asylum, or shall be found within the territories of the other: *Provided*, That this shall only be done upon such evidence of criminality as, according to the laws of the place where the fugitive or person so charged shall be found, would justify his apprehension and commitment for trial, if the crime or offense had there been committed; and the respective judges and other magistrates of the two Governments shall have power, jurisdiction and authority, upon complaint made under oath, to issue a warrant for the apprehension of the fugitive or person so charged, that he may be brought before such judges or other magistrates, respectively, to the end that the evidence of criminality may be heard and considered; and if, on such hearing, the evidence be deemed sufficient to sustain the charge, it shall be the duty of the examining judge or magistrate to certify the same to the proper executive authority, that a warrant may issue for the surrender of such fugitive. The expense of such apprehension and delivery shall be borne and defrayed by the party who makes the requisition and receives the fugitive. Nothing in this article contained shall be construed to extend to crimes of a political character.

ART. II. Neither of the contracting parties shall be bound to deliver up its own citizens or subjects under the stipulations of this convention.

ART. III. Whenever any person accused of any of the crimes enumerated in this convention shall have committed a new crime in the territories of the State where he has sought an asylum or shall be found, such person shall not be delivered up, under the stipulations of this convention, until he shall have been tried, and shall have received the punishment due to such new crime, or shall have been acquitted thereof.

ART. IV. The present convention shall continue in force until the first of January, one thousand eight hundred and sixty (1860); and if neither party shall have given to the other six months' previous notice of its intention then to terminate the same, it shall further remain in force until the end of twelve months after either of the high contracting parties shall have given notice to the other of such intention; each of the high contracting parties reserving to itself the right of giving such notice to the other at any time after the expiration of the said first day of January, one thousand eight hundred and sixty (1860).

ART. V. The present convention shall be ratified by the President, by and with the advice and consent of the Senate of the United States, and by the Government of Baden; and the ratifications shall be exchanged in Berlin within one year from the date hereof, or sooner if possible.

In faith whereof, the respective Plenipotentiaries have signed this convention, and have hereunto affixed their seals.

Done in duplicate, at Berlin, the thirtieth day of January, one thousand eight hundred and fifty-seven (1857), and the eighty-first year of the Independence of the United States.

[L. s.]

P. D. VROOM.

[L. s.]

ADOLPH BAR. MARSCHALL DE BIEBERSTEIN.

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XVII. SWEDEN AND NORWAY, MARCH 21, 1860.

Whereas it is found expedient, for the better administration of justice and the prevention of crime within the territories and jurisdiction of the parties respectively, that persons committing certain crimes, being fugitives from justice, should, under certain circumstances, be reciprocally delivered up, and also to enumerate such crimes explicitly: The United States of America on the one part, and His Majesty the King of Sweden and Norway on the other part, having resolved to treat on this subject, have for that purpose appointed their respective Plenipotentiaries to negotiate and conclude a convention, that is to say:

The President of the United States of America, Lewis Cass, Secretary of State of the United States; and His Majesty the King of Sweden and Norway, Baron Nicholas William de Wetterstedt, Knight of the Orders of the Polar Star and of St. Olaf, Commander of the Order of Dannebrog of Denmark, His said Majesty's Minister Resident near the Government of the United States:

Who, after reciprocal communication of their respective powers, have agreed to and signed the following articles:

ARTICLE I. It is agreed that the high contracting parties shall, upon mutual requisitions by them, their Diplomatic or Consular Agents, respectively made, deliver up to justice all persons who, being charged with or condemned for any of the crimes enumerated in the following article, committed within the jurisdiction of either party, shall seek an asylum, or shall be found within the territories of the other: *Provided*, That this surrender and delivery shall not be obligatory on either of the high contracting parties except upon presentation by the other, in original or in verified copy, of the judicial declaration or sentence establishing the culpability of the fugitive, and issued by the proper authority of the Government who claims the surrender, in case such sentence or declaration shall have been pronounced; said document to be drawn up and certified according to the forms prescribed by the laws of the country making the demand. But if such sentence or declaration shall not have been pronounced, then the surrender may be demanded, and shall be made, when the demanding party shall have furnished such proof of culpability as would have been sufficient to justify the apprehension and commitment for trial of the accused if the offense had been committed in the country where he shall have taken refuge.

ART. II. Persons shall be so delivered up who shall have been charged with or sentenced for any of the following crimes: Murder (including assassination, parricide, infanticide, and poisoning), or attempt to commit murder, rape, piracy (including mutiny on board a ship, whenever the crew or part thereof, by fraud or violence against the commander, have taken possession of the vessel); arson, robbery and burglary, forgery, and the fabrication or circulation of counterfeit money, whether coin or paper money; embezzlement by public officers, including appropriation of public funds.

ART. III. The expenses of any detention and delivery, effected in virtue of the preceding provisions, shall be borne and defrayed by the party who makes the requisition and receives the fugitive.

ART. IV. Neither of the contracting parties shall be bound to deliver up, under the stipulations of this convention, any person who, according to the laws of the country where he shall be found, is a citizen or a subject of the same at the time his surrender is demanded.

ART. V. The provisions of the present convention shall not be applied to any crime or offense of a political character.

ART. VI. Whenever any person, accused of any of the crimes enumerated in this convention, shall have committed a new crime in the territories of the State where he sought an asylum or shall be found, such person shall not be delivered up, under the stipulations of this convention, until he shall have been tried, and shall have received the punishment due to such new crime, or shall have been acquitted thereof.



ART. VII. This convention shall not take effect until ten days after its publication, made according to the laws of the respective Governments.

It shall remain in force until the end of six months after either of the high contracting parties shall have given notice to the other of its intention to terminate the same.

It shall be ratified by the President of the United States, by and with the advice and consent of the Senate thereof, and by His Majesty the King of Sweden and Norway, and the ratifications shall be exchanged within ten months from the date of its signature, or earlier if possible.

In faith whereof, the respective Plenipotentiaries have signed this convention, and have hereunto affixed their seals.

Done in duplicate, at Washington, the twenty-first day of March, one thousand eight hundred and sixty, and the eighty-fourth year of the Independence of the United States.

LEW. CASS. [SEAL.]  
N. W. DE WETTERSTEDT. [SEAL.]

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XVIII. VENEZUELA, AUGUST 27, 1860.

ARTICLE XXVII. The United States of America and the Republic of Venezuela, on requisitions made in their name through the medium of their respective Diplomatic and Consular Agents, shall deliver up to justice persons who, being charged with the crimes enumerated in the following article, committed within the jurisdiction of the requiring party, shall seek asylum, or shall be found within the territories of the other: *Provided*, That this shall be done only when the fact of the commission of the crime shall be so established as to justify their apprehension and commitment for trial, if the crime had been committed in the country where the persons so accused shall be found; in all of which the tribunals of said country shall proceed and decide according to their own laws.

ART. XXVIII. Persons shall be delivered up, according to the provisions of this convention, who shall be charged with any of the following crimes, to-wit: Murder (including assassination, parricide, infanticide, and poisoning); attempt to commit murder, rape, forgery, the counterfeiting of money, arson, robbery with violence, intimidation or forcible entry of an inhabited house, piracy, embezzlement by public officers, or by persons hired or salaried, to the detriment of their employers, when these crimes are subject to infamous punishment.

ART. XXIX. On the part of each country the surrender shall be made only by the authority of the executive thereof. The expense of detention and delivery, effected in virtue of the preceding articles, shall be at the cost of the party making the demand.

ART. XXX. The provisions of the foregoing articles relating to the surrender of fugitive criminals shall not apply to offenses committed before the date hereof, nor to those of a political character.

ART. XXXI. This convention is concluded for the term of eight years, dating from the exchange of the ratifications; and if one year before the expiration of that period neither of the contracting parties shall have announced, by an official notification, its intention to the other to arrest the operations of said convention, it shall continue binding for twelve months longer, and so on, from year to year, until the expiration of the twelve months which will follow a similar declaration, whatever the time at which it may take place.

ART. XXXII. This convention shall be submitted on both sides to the approval and ratification of the respective competent authorities of each of the contracting parties, and the ratifications shall be exchanged at Caracas as soon as circumstances shall admit.

In faith whereof, the respective Plenipotentiaries have signed the afore-going articles, in the English and Spanish languages, and they have hereunto affixed their seals.

Done in duplicate, at the city of Caracas, this twenty-seventh day of August in the year of our Lord one thousand eight hundred and sixty.

E. A. TURPIN. [L. S.]

PEDRO DE LAS CASAS. [L. S.]

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XIX. MEXICO, DECEMBER 11, 1861.

The United States of America and the United Mexican States, having judged it expedient, with a view to the better administration of justice and to the prevention of crime within their respective territories and jurisdictions, that persons charged with the crimes hereinafter enumerated, and being fugitives from justice, should, under certain circumstances, be reciprocally delivered up, have resolved to conclude a treaty for this purpose, and have named as their respective Plenipotentiaries, that is to say:

The President of the United States of America has appointed Thomas Corwin, a citizen of the United States, and their Envoy Extraordinary and Minister Plenipotentiary near the Mexican Government; and the President of the United Mexican States has appointed Sebastian Lerdo de Tejada, a citizen of the said States, and a Deputy of the Congress of the Union:

Who, after having communicated to each other their respective full powers, found in good and due form, have agreed upon and concluded the following articles:

ARTICLE I. It is agreed that the contracting parties shall, on requisitions made in their name, through the medium of their respective diplomatic agents, deliver up to justice persons who being accused of the crimes enumerated in article third of the present treaty, committed within the jurisdiction of the requiring party, shall seek an asylum, or shall be found within the territories of the other: *Provided*, That this shall be done only when the fact of the commission of the crime shall be so established as that the laws of the country in which the fugitive or the person accused shall be

found, would justify his or her apprehension and commitment for trial, if the crime had been there committed.

ART. II. In the case of crimes committed in the frontier States or Territories of the two contracting parties, requisitions may be made through their respective diplomatic agents, or through the chief civil authority of said States or Territories, or through such chief civil or judicial authority of the districts or counties bordering on the frontier as may for this purpose be duly authorized by the said chief civil authority of the said frontier States or Territories, or when, from any cause, the civil authority of such State or Territory shall be suspended, through the chief military officer in command of such State or Territory.

ART. III. Persons shall be so delivered up who shall be charged, according to the provisions of this treaty, with any of the following crimes, whether as principals, accessories or accomplices, to-wit: Murder (including assassination, parricide, infanticide, and poisoning); assault with intent to commit murder; mutilation; piracy; arson; rape; kidnapping, defining the same to be the taking and carrying away of a free person by force or deception; forgery, including the forging or making, or knowingly passing or putting in circulation counterfeit coin or bank notes, or other paper current as money, with intent to defraud any person or persons; the introduction or making of instruments for the fabrication of counterfeit coin or bank notes, or other paper current as money; embezzlement of public moneys; robbery, defining the same to be the felonious and forcible taking from the person of another of goods or money, to any value, by violence or putting him in fear; burglary, defining the same to be breaking and entering into the house of another with intent to commit felony; and the crime of larceny of cattle or other goods and chattels, of the value of twenty-five dollars or more, when the same is committed within the frontier States or Territories of the contracting parties.

ART. IV. On the part of each country the surrender of fugitives from justice shall be made only by the authority of the Executive thereof, except in the case of crimes committed within the limits of the frontier States or Territories, in which latter case the surrender may be made by the chief civil authority thereof, or such chief civil or judicial authority of the districts or counties bordering on the frontier as may for this purpose be duly authorized by the said chief civil authority of the said frontier States or Territories, or if, from any cause, the civil authority of such State or Territory shall be suspended, then such surrender may be made by the chief military officer in command of such State or Territory.

ART. V. All the expenses whatever of detention and delivery, effected in virtue of the preceding provisions, shall be borne and defrayed by the Government or authority of the frontier State or Territory in whose name the requisition shall have been made.

ART. VI. The provisions of the present treaty shall not be applied in any manner to any crime or offense of a purely political character, nor shall

it embrace the return of fugitive slaves, nor the delivery of criminals who when the offense was committed, shall have been held in the place where the offense was committed in the condition of slaves, the same being expressly forbidden by the Constitution of Mexico; nor shall the provisions of the present treaty be applied in any manner to the crimes enumerated in the third article committed anterior to the date of the exchange of the ratifications hereof. Neither of the contracting parties shall be bound to deliver up its own citizens under the stipulations of this treaty.

ART. VII. This treaty shall continue in force until it shall be abrogated by the contracting parties, or one of them; but it shall not be abrogated except by mutual consent, unless the party desiring to abrogate it shall give twelve months' previous notice.

ART. VIII. The present treaty shall be ratified in conformity with the Constitutions of the two countries, and the ratifications shall be exchanged at the city of Mexico within six months from the date hereof, or earlier if possible.

In witness whereof, we, the Plenipotentiaries of the United States of America and of the United Mexican States, have signed and sealed these presents.

Done in the city of Mexico, on the eleventh day of December, in the year of our Lord, one thousand eight hundred and sixty-one, the eighty-sixth of the Independence of the United States of America, and the forty-first of that of the United Mexican States.

[L. s.] THOS. CORWIN.

[L. s.] SEB'N LERDO DE TEJADA.

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XX. HAYTI, NOVEMBER 3, 1864.

ARTICLE XXXVIII. It is agreed that the high contracting parties shall, on requisitions made in their name, through the medium of their respective diplomatic agents, deliver up to justice persons who, being charged with the crimes enumerated in the following article, committed within the jurisdiction of the requiring party, shall seek an asylum or shall be found within the territories of the other: *Provided*, That this shall be done only when the fact of the commission of the crime shall be so established as to justify their apprehension and commitment for trial, if the crime had been committed in the country where the persons so accused shall be found; in all of which the tribunals of said country shall proceed and decide according to their own laws.

ART. XXXIX. Persons shall be delivered up, according to the provisions of this treaty, who shall be charged with any of the following crimes, to-wit: Murder (including assassination, parricide, infanticide, and poisoning); attempt to commit murder, piracy, rape, forgery, the counterfeiting of money, the utterance of forged paper, arson, robbery, and embezzlement by public officers, or by persons hired or salaried, to the detri-

ment of their employers, when these crimes are subject to infamous punishment.

ART. XL. The surrender shall be made, on the part of each country, only by the authority of the Executive thereof. The expenses of the detention and delivery, effected in virtue of the preceding articles, shall be at the cost of the party making the demand.

ART. XLI. The provisions of the foregoing articles relating to the extradition of fugitive criminals shall not apply to offenses committed before the date hereof, nor to those of a political character. Neither of the contracting parties shall be bound to deliver up its own citizens under the provisions of this treaty.

ART. XLII. The present treaty shall remain in force for the term of eight years, dating from the exchange of ratifications, and if, one year before the expiration of that period, neither of the contracting parties shall have given notice to the other of its intention to terminate the same, it shall continue in force, from year to year, until one year after an official notification to terminate the same, as aforesaid.

ART. XLIII. The present treaty shall be submitted on both sides to the approval and ratification of the respective competent authorities of each of the contracting parties, and the ratifications shall be exchanged at Washington within six months from the date hereof, or sooner if possible.

In faith whereof, the respective Plenipotentiaries have signed the foregoing articles, in the English and French languages, and they have hereto affixed their seals.

Done, in duplicate, at the city of Port au Prince, this third day of November, in the year of our Lord, one thousand eight hundred and sixty-four.

[L. s.]

B. F. WHIDDEN.

[L. s.]

BOYER BAZELAIS.

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XXI. DOMINICAN REPUBLIC, FEBRUARY 8, 1867.

ARTICLE XXVII. The United States of America and the Dominican Republic, on requisitions made in their name through the medium of their respective Diplomatic and Consular Agents, shall deliver up to justice persons who, being charged with the crimes enumerated in the following article, committed within the jurisdiction of the requiring party, shall seek asylum, or shall be found within the territories of the other: *Provided*, That this shall be done only when the fact of the commission of the crime shall be so established as to justify their apprehension and commitment for trial, if the crime had been committed in the country where the persons so accused shall be found; in all of which the tribunals of said country shall proceed and decide according to their own laws.

ART. XXVIII. Persons shall be delivered up according to the provisions of this convention, who shall be charged with any of the following crimes,

to-wit: Murder (including assassination, parricide, infanticide and poisoning), attempt to commit murder, rape, forgery, the counterfeiting of money, arson, robbery with violence, intimidation or forcible entry of an inhabited house, piracy, embezzlement by public officers, or by persons hired or salaried to the detriment of their employers, when these crimes are subject to infamous punishment.

ART. XXIX. On the part of each country the surrender shall be made only by the authority of the executive thereof. The expenses of detention and delivery, effected in virtue of the preceding articles, shall be at the cost of the party making the demand.

ART. XXX. The provisions of the foregoing articles relating to the surrender of fugitive criminals shall not apply to offenses committed before the date hereof, nor to those of a political character.

ART. XXXI. This convention is concluded for the term of eight years, dating from the exchange of the ratifications, and if one year before the expiration of that period, neither of the contracting parties shall have announced, by an official notification, its intention to the other to arrest the operation of said convention, it shall continue binding for twelve months longer, and so on, from year to year, until the expiration of twelve months which will follow a similar declaration, whatever the time at which it may take place.

ART. XXXII. This convention shall be submitted on both sides to the approval and ratification of the respective competent authorities of each of the contracting parties, and the ratifications shall be exchanged at Santo Domingo as soon as circumstances shall admit.

In faith whereof, the respective Plenipotentiaries have signed the foregoing articles in the English and Spanish languages, and they have hereunto affixed their seals.

Done in duplicate at the city of Santo Domingo, this eighth day of February, in the year of our Lord, one thousand eight hundred and sixty-seven.

[L. s.]	JNO. SOMERS SMITH
[L. s.]	JOSE G. GARCIA.
[L. s.]	JUAN R. FIALLO.

#### XXII. ITALY, MARCH 23, 1868.

The United States of America and His Majesty the King of Italy, having judged it expedient, with a view to the better administration of justice, and to the prevention of crimes within their respective territories and jurisdiction, that persons convicted of or charged with the crimes hereinafter specified, and being fugitives from justice, should, under certain circumstances, be reciprocally delivered up, have resolved to conclude a convention for that purpose and have appointed as their Plenipotentiaries:

The President of the United States, William H. Seward, Secretary of State, His Majesty the King of Italy, the Commander Marcello Cerruti, Envoy Extraordinary and Minister Plenipotentiary:

Who, after reciprocal communication of their full powers, found in good and due form, have agreed upon the following articles, to wit:

ARTICLE I. The Government of the United States, and the Government of Italy, mutually agree to deliver up persons who, having been convicted of or charged with the crimes specified in the following article, committed within the jurisdiction of one of the contracting parties, shall seek an asylum or be found within the territories of the other: *Provided*, that this shall only be done upon such evidence of criminality as according to the laws of the place where the fugitive or person so charged shall be found, would justify his or her apprehension and commitment for trial, if the crime had been there committed.

ART. II. Persons shall be delivered up who shall have been convicted of, or be charged, according to the provisions of this convention, with any of the following crimes:

1. Murder, comprehending the crimes designated in the Italian penal code by the terms of parricide, assassination, poisoning and infanticide.

2. The attempt to commit murder.

3. The crimes of rape, arson, piracy and mutiny on board a ship, whenever the crew or part thereof, by fraud or violence against the commander, have taken possession of the vessel.

4. The crime of burglary, defined to be the action of breaking and entering by night into the house of another with the intent to commit felony; and the crime of robbery, defined to be the action of feloniously and forcibly taking from the person of another goods or money, by violence or putting him in fear.

5. The crime of forgery, by which is understood the utterance of forged papers, the counterfeiting of public sovereign or government acts.

6. The fabrication or circulation of counterfeit money, either coin or paper, of public bonds, bank notes and obligations, and in general, of any title and instrument of credit whatsoever, the counterfeiting of seals, dies, stamps and marks of State and public administrations, and the utterance thereof.

7. The embezzlement of public moneys committed within the jurisdiction of either party, by public officers or depositors.

8. Embezzlement by any person or persons hired or salaried to the detriment of their employers, when these crimes are subject to infamous punishment.

ART. III. The provisions of this treaty shall not apply to any crime or offense of a political character, and the person or persons delivered up for the crimes enumerated in the preceding article shall, in no case, be tried for any ordinary crime, committed previously to that for which his or their surrender is asked.

ART. IV. If the person whose surrender may be claimed, pursuant to the stipulations of the present treaty, shall have been arrested for the com-

mission of offenses in the country where he has sought an asylum, or shall have been convicted thereof, his extradition may be deferred until he shall have been acquitted, or have served the term of imprisonment to which he may have been sentenced.

ART. V. Requisitions for the surrender of fugitives from justice shall be made by the respective diplomatic agents of the contracting parties, or in the event of the absence of these from the country or its seat of Government, they may be made by superior consular officers. If the person whose extradition may be asked for shall have been convicted of a crime, a copy of the sentence of the court in which he may have been convicted, authenticated under its seal and an attestation of the official character of the judge by the proper executive authority, and of the latter by the Minister or Consul of the United States or of Italy, respectively, shall accompany the requisition. When, however, the fugitive shall have been merely charged with crime, a duly authenticated copy of the warrant for his arrest in the country where the crime may have been committed, or of the depositions upon which such warrant may have been issued, must accompany the requisition as aforesaid. The President of the United States or the proper Executive authority in Italy may then issue a warrant for the apprehension of the fugitive, in order that he may be brought before the proper judicial authority for examination. If it should then be decided that, according to law and the evidence, the extradition is due pursuant to the treaty, the fugitive may be given up according to the forms prescribed in such cases.

ART. VI. The expenses of the arrest, detention and transportation of the persons claimed shall be paid by the Government in whose name the requisition shall have been made.

ART. VII. This convention shall continue in force during five (5) years from the day of exchange of ratifications; but if neither party shall have given to the other six (6) months' previous notice of its intention to terminate the same, the convention shall remain in force five years longer, and so on.

The present convention shall be ratified, and the ratifications exchanged at Washington within six (6) months, and sooner if possible.

In witness whereof, the respective Plenipotentiaries have signed the present convention in duplicate, and have thereunto affixed their seals.

Done at Washington the twenty-third day of March, A. D. one thousand eight hundred and sixty-eight, and of the Independence of the United States the ninety-second.

[SEAL.]

WILLIAM H. SEWARD.

[SEAL.]

M. CERRUTI.

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ADDITIONAL ARTICLE, JANUARY 21, 1869.

It is agreed that the concluding paragraph of the second article of the convention aforesaid shall be so amended as to read as follows:



8. Embezzlement by any person or persons hired or salaried, to the detriment of their employers, when these crimes are subject to infamous punishment according to the laws of the United States, and criminal punishment according to laws of Italy.

In witness whereof, the respective Plenipotentiaries have signed the present article in duplicate, and have affixed thereto the seal of their arms.

Done at Washington the 21st day of January, 1869.

[SEAL.] WILLIAM H. SEWARD.  
[SEAL.] M. CERRUTI.

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XXIII. REPUBLIC OF SALVADOR, MAY 23, 1870.

The United States of America and the Republic of Salvador, having judged it expedient, with a view to the better administration of justice, and to the prevention of crimes within their respective territories and jurisdiction, that persons convicted of or charged with the crimes hereinafter specified, and being fugitives from justice, should, under certain circumstances, be reciprocally delivered up, have resolved to conclude a convention for that purpose, and have appointed as their Plenipotentiaries: the President of the United States, Alfred T. A. Torbet, Minister Resident to Salvador; the President of the Republic of Salvador, Senor Doctor Don Gregorio Arbizú, Minister of Foreign Affairs, who, after reciprocal communication of their full powers, found in good and due form, have agreed upon the following articles, to-wit:

ARTICLE I. The Government of the United States and the Government of Salvador mutually agree to deliver up persons who, having been convicted of or charged with the crimes specified in the following article committed within the jurisdiction of one of the contracting parties, shall seek an asylum or be found within the territories of the other: *Provided*, That this shall only be done upon such evidence of criminality as according to the laws of the place where the fugitive or person so charged shall be found, would justify his or her apprehension and commitment for trial if the crime had been there committed.

ART. II. Persons shall be delivered up who shall have been convicted of, or be charged, according to the provisions of this convention, with any of the following crimes:

1. Murder, comprehending the crimes designated in the penal codes of the contracting parties by the terms homicide, parricide, assassination, poisoning and infanticide.

2. The attempt to commit murder.

3. The crimes of rape, arson, piracy, and mutiny on board a ship, whenever the crew, or part thereof, by fraud or violence against the commander, have taken possession of the vessel.

4. The crime of burglary, defined to be the action of breaking and entering by night into the house of another, with the intent to commit felony;

and the crime of robbery, defined to be the action of feloniously and forcibly taking from the person of another goods or money by violence, or putting him in fear.

5. The crime of forgery, by which is understood the utterance of forged papers, the counterfeiting of public, sovereign or government acts.

6. The fabrication or circulation of counterfeit money, either coin or paper, of public bonds, bank-notes, and obligations, and in general, of all things being titles or instruments of credit, the counterfeiting of seals, dies, stamps, and marks of State and public administration, and the utterance thereof.

7. The embezzlement of public moneys, committed within the jurisdiction of either party, by public officers or depositors.

8. Embezzlement by any person or persons, hired or salaried, to the detriment of their employers, when these crimes are subject to infamous punishment.

ART. III. The provisions of this treaty shall not apply to any crime or offense of a political character; and the person or persons delivered up for the crimes enumerated in the preceding article shall in no case be tried for any ordinary crime committed previously to that for which his or their surrender is asked.

ART. IV. If the person whose surrender may be claimed, pursuant to the stipulations of the present treaty, shall have been arrested for the commission of offenses in the country where he has sought an asylum, or shall have been convicted therefor, his extradition may be deferred until he shall have been acquitted or have served the term of imprisonment to which he may have been sentenced.

ART. V. In no case and for no motive shall the high contracting parties be obliged to deliver up their own subjects. If, in conformity with the laws in force in the State to which the accused belongs, he ought to be submitted to criminal procedure for crimes committed in the other State, the latter must communicate the information and documents, send the implements or tools which were employed to perpetrate the crime, and procure every other explanation or evidence necessary to prosecute the case.

ART. VI. Requisitions for the surrender of fugitives from justice shall be made by the respective diplomatic agents of the contracting parties, or, in the event of the absence of these from the country, or its seat of government, they may be made by superior consular officers. If the person whose extradition may be asked for shall have been convicted of a crime, a copy of the sentence of the court in which he may have been convicted, authenticated under its seal, and an attestation of the official character of the judge by the proper executive authority, and of the latter by the Minister or Consul of the United States, or of Salvador, respectively, shall accompany the requisition. When, however, the fugitive shall have been merely charged with crime, a duly authenticated copy of the warrant for his arrest in the country where the crime may have been committed, or the deposi-

tions upon which such warrant may have been issued, must accompany the requisition aforesaid. The President of the United States or the President of Salvador may then issue a warrant for the apprehension of the fugitive, in order that he may be brought before the proper judicial authority for examination. If it should then be decided that, according to law and the evidence, the extradition is due, pursuant to the treaty, the fugitive may be given up according to the forms prescribed in such cases.

ART. VII. The expenses of the arrest, detention and transportation of persons claimed shall be paid by the government in whose name the requisition shall have been made.

ART. VIII. This convention shall continue in force during ten (10) years from the day of the exchange of ratifications; but if neither party shall have given to the other six (6) months' previous notice of its intention to terminate the same, the convention shall remain in force ten years longer, and so on.

The present convention shall be ratified and the ratifications exchanged at the city of Washington within twelve (12) months, and sooner if possible.

In witness whereof, the respective Plenipotentiaries have signed the present convention in duplicate, and have thereunto affixed their seals.

Done at the city of San Salvador the twenty-third day of May, A. D. one thousand eight hundred and seventy, and of the Independence of the United States the ninety-fourth.

[L. s.]	ALFRED T. A. TORBERT.
[L. s.]	GREGO. ARBIZU.

#### XXIV. NICARAGUA, JUNE 25, 1870.

The United States of America and the Republic of Nicaragua, having judged it expedient, with a view to the better administration of justice, and to prevention of crimes within their respective territories and jurisdiction, that persons convicted of, or charged with, the crimes hereinafter mentioned, and being fugitives from justice, should, under certain circumstances, be reciprocally delivered up, have resolved to conclude a convention for that purpose, and have appointed as their Plenipotentiaries:

The President of the United States, Charles N. Riotte, a citizen and Minister Resident of the United States in Nicaragua; the President of the Republic of Nicaragua, Mister Tomas Ayon, Minister for Foreign Relations:

Who, after reciprocal communication of their full powers, found in good and due form, have agreed upon the following articles, viz.:

ARTICLE I. The Government of the United States and the Government of Nicaragua mutually agree to deliver up persons who, having been convicted of or charged with the crimes specified in the following article, committed within the jurisdiction of one of the contracting parties, shall seek

an asylum or be found within the territories of the other; *Provided*, That this shall only be done upon such evidence of criminality as, according to the laws of the place where the fugitive or person so charged shall be found, would justify his or her apprehension and commitment for trial, if the crime had been there committed.

ART. II. Persons shall be delivered up, who shall have been convicted of, or be charged, according to the provisions of this convention, with any of the following crimes:

1. Murder, comprehending assassination, parricide, infanticide and poisoning.

2. The crimes of rape, arson, piracy and mutiny on board a ship, when- ever the crew, or a part thereof, by fraud or violence against the commander, have taken possession of the vessel.

3. The crime of burglary, defined to be the action of breaking and en- tering by night into the house of another with the intent to commit felony; and the crime of robbery, defined to be the action of feloniously and for- cibly taking from the person of another goods or money, by violence, or putting him in fear.

4. The crime of forgery, by which is understood the utterance of forged papers, the counterfeiting of public, sovereign, or government acts.

5. The fabrication or circulation of counterfeit money, either coin or paper, of public bonds, bank notes, and obligations, and in general, of all titles of instruments of credit, the counterfeiting of seals, dies, stamps, and marks of State and public administrations, and the utterance thereof.

6. The embezzlement of public moneys, committed within the jurisdic- tion of either party, by public officers or depositors.

7. Embezzlement by any person or persons hired or salaried, to the detri- ment of their employers, when these crimes are subjected to infamous pun- ishment.

ART. III. The provisions of this treaty shall not apply to any crime or offense of a political character, and the person or persons delivered up for the crimes enumerated in the preceding article shall in no case be tried for any ordinary crime, committed previously to that for which his or their surrender is asked.

ART. IV. If the person, whose surrender may be claimed pursuant to the stipulations of the present treaty, shall have been arrested for the com- mission of offenses in the country where he has sought an asylum, or shall have been convicted thereof, his extradition may be deferred until he shall have been acquitted, or have served the term of imprisonment to which he may have been sentenced.

ART. V. Requisitions for the surrender of fugitives from justice shall be made by the respective diplomatic agents of the contracting parties, or, in the event of the absence of these from the country, or its seat of government, they may be made by superior consular officers. If the person

whose extradition may be asked for shall have been convicted of a crime, a copy of the sentence of the court in which he may have been convicted, authenticated under its seal, and an attestation of the official character of the judge by the proper executive authority, and of the latter by the Minister or Consul of the United States or of Nicaragua, respectively, shall accompany the requisition. When, however, the fugitive shall have been merely charged with crime, a duly authenticated copy of the warrant for his arrest in the country where the crime may have been committed, and of the depositions upon which such warrant may have been issued, must accompany the requisition as aforesaid. The President of the United States, or the proper executive authority in Nicaragua, may then issue a warrant for the apprehension of the fugitive, in order that he may be brought before the proper judicial authority for examining the question of extradition. If it should then be decided that, according to the law and evidence, the extradition is due pursuant to this treaty, the fugitive may be given up according to the forms prescribed in such cases.

ART. VI. The expenses of the arrest, detention, and transportation of the persons claimed shall be paid by the government in whose name the requisition shall have been made.

ART. VII. This convention shall continue in force during five (5) years from the day of exchange of ratifications; but if neither party shall have given to the other six (6) months' previous notice of its intention to terminate the same the convention shall remain in force five (5) years longer, and so on.

The present convention shall be ratified, and the ratifications exchanged at the capital of Nicaragua, or any other place temporarily occupied by the Nicaraguan Government, within twelve (12) months, or sooner if possible.

In witness whereof, the respective Plenipotentiaries have signed the present convention in duplicate, and have thereunto affixed their seals.

Done at the city of Managua, capital of the Republic of Nicaragua, the twenty-fifth day of June, one thousand eight hundred and seventy, of the Independence of the United States the ninety-fourth, and of the Independence of Nicaragua the fifty-ninth.

[SEAL.]

CHARLES N. RIOTTE.

[SEAL.]

TOMAS AYON.

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XXV. PERU, SEPTEMBER 12, 1870.

The United States of America and the Republic of Peru, having judged it expedient, with a view to the better administration of justice and the prevention of crime within their respective territories and jurisdictions, that persons charged with the crimes hereinafter enumerated should, under certain circumstances, be reciprocally delivered up, have resolved to conclude a treaty for this purpose and have named as their respective Plenipotentiaries, that is to say: The President of the United States of America

has appointed Alvin P. Hovey, Envoy Extraordinary and Minister Plenipotentiary of the United States of America, near the Government of the Republic of Peru; and the President of Peru has appointed his Excellency Doctor Jose J. Loayza, Minister of Foreign Affairs of Peru:

Who, after having communicated to each other their respective full powers, found in good and true form, have agreed upon and concluded the following articles:

ARTICLE I. It is agreed that the contracting parties shall, on requisitions made in their name through the medium of their respective diplomatic agents, deliver up to justice persons who, being accused or convicted of the crimes enumerated in Article II of the present treaty, committed within the jurisdiction of the requiring party, shall seek an asylum, or shall be found within the territories of the other: *Provided*, That this shall be done only when the fact of the commission of the crime shall be so established as that the laws of the country in which the fugitive or the person so accused shall be found, would justify his or her apprehension and commitment for trial, if the crime had been there committed.

ART. 2. Persons shall be so delivered up who shall be charged, according to the provisions of this treaty, with any of the following crimes, whether as principals, accessories, or accomplices, to-wit:

1. Murder, comprehending the crimes of parricide, assassination poisoning, and infanticide.
2. Rape, abduction by force.
3. Bigamy.
4. Arson.
5. Kidnapping, defining the same to be the taking or carrying away of a person by force or deception.
6. Robbery, highway robbery, larceny.
7. Burglary, defined to be the action of breaking and entering by night-time into the house of another person with the intent to commit a felony.
8. Counterfeiting or altering money, the introduction or fraudulent commerce of and in false coin or money; counterfeiting the certificates or obligations of the government, of bank notes and of any other documents of public credit, the uttering and use of the same; forging or altering judicial judgments or decrees of the government or courts, of the seals, dies, postage stamps and revenue stamps of the Government, and the use of the same; forging public and authentic deeds and documents, both commercial and of banks, and the use of the same.
9. Embezzlement of public moneys committed within the jurisdiction of either party by public officers or bailees, and embezzlement by any person hired or salaried.
10. Fraudulent bankruptcy.
11. Fraudulent barratry.
12. Mutiny on board of a vessel when the persons who compose the

crew have taken forcible possession of the same, or have transferred the ship to pirates.

13. Severe injuries intentionally caused on railroads, to telegraph lines or to persons by means of explosions of mines or steam-boilers.

14. Piracy.

ART. III. The provisions of the present treaty shall not be applied in any manner to any crime or offense of a purely political character, nor shall the provisions of the present treaty be applied in any manner to the crimes enumerated in the second article, committed anterior to the date of the exchange of the ratifications hereof. Neither of the contracting parties shall be bound to deliver up its own citizens under the stipulations of this treaty.

ART. IV. The extradition will be granted in virtue of the demand made by the one government on the other, with the remission of a condemnatory sentence, an order of arrest, or of any other process equivalent to such order in which will be specified the character and gravity of the imputed acts, and the dispositions of the penal laws relative to the case. The documents accompanying the demand for extradition shall be originals or certified copies, legally authorized by the tribunals or by a competent person. If possible, there shall be remitted at the same time a descriptive list of the individual required, or any other proof toward his identity.

ART. V. If the person accused or condemned is not a citizen of either of the contracting powers the government granting the extradition will inform the government of the country to which the accused or condemned may belong of the demand made, and if the last-named government reclaims the individual on its own account for trial in its own tribunals, the government to which was made the demand of extradition may, at will, deliver the criminal to the State in whose territories the crime was committed, or to that to which the criminal belongs. If the accused or sentenced person whose extradition may be demanded in virtue of the present convention from one of the contracting parties, should, at the same time, be the subject of claims from one or other governments simultaneously, for crimes or misdemeanors committed in their respective territories, he or she shall be delivered up to that government in whose territories the offense committed was of the gravest character, and when the offenses are of like nature and gravity, the delivery will be made to the government making the first demand, and if the dates of the demands be the same, that of the nation to which the criminal may belong will be preferred.

ART. VI. If the person claimed is accused or sentenced in the country where he may have taken refuge, for a crime or misdemeanor committed in that country, his delivery may be delayed until the definitive sentence releasing him be pronounced, or until such time as he may have complied with the punishment inflicted on him in the country where he took refuge.

ART. VII. In cases not admitting of delay, and especially in those where there is danger of escape, each of the two governments, authorized by the order for apprehension, may, by the most expeditious means, ask and ob-

tain the arrest of the person accused or sentenced, on condition of presenting the said order for apprehension as soon as may be possible, not exceeding four months.

ART. VIII. All expenses whatever of detention and delivery, effected in virtue of the preceding provisions, shall be borne and defrayed by the government in whose name the requisition shall have been made.

ART. IX. This treaty shall commence from the date of the exchange of the ratifications, and shall continue in force until it shall be abrogated by the contracting parties, or one of them; but it shall not be abrogated, except by mutual consent, unless the party desiring to abrogate it shall give twelve months' previous notice.

ART. X. The present treaty shall be ratified in conformity with the constitutions of the two countries, and the ratifications shall be exchanged at the cities of Washington or Lima, within eighteen months from the date hereof, or sooner if possible.

In witness whereof, we, the Plenipotentiaries of the United States of America and the Republic of Peru, have signed and sealed these presents.

Done in the city of Lima, in duplicate, English and Spanish, this, the twelfth day of September, in the year of our Lord one thousand eight hundred and seventy.

[SEAL.]

ALVIN H. HOVEY.

[SEAL.]

JOSE J. LOAYZA.

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XXVI. ORANGE FREE STATE, DECEMBER 22, 1871.

ARTICLE VIII. The United States of America and the Orange Free State, on requisitions made in their name, through the medium of their respective diplomatic or consular agents, shall deliver up to justice, persons who, being charged with the crimes enumerated in the following article, committed within the jurisdiction of the requiring party, shall seek asylum, or shall be found within the territories of the other: *Provided*, That this shall be done only when the fact of the commission of the crime shall be so established as to justify their apprehension and commitment for trial if the crime had been committed in the country where the person so accused shall be found.

ART. IX. Persons shall be delivered up according to the provisions of this convention who shall be charged with any of the following crimes, to-wit: Murder (including assassination, parricide, infanticide and poisoning), attempt to commit murder, rape, forgery, or the emission of forged papers, arson, robbery with violence, intimidation, or forcible entry of an inhabited house, piracy, embezzlement by public officers, or by persons hired or salaried, to the detriment of their employers, when these crimes are subject to infamous punishment.

ART. X. The surrender shall be made by executives of the contracting parties respectively.



ART. XI. The expense of detention and delivery effected pursuant to the preceding articles shall be at the cost of the party making the demand.

ART. XII. The provisions of the foregoing articles relating to the surrender of fugitive criminals shall not apply to offenses committed before the date hereof, nor to those of a political character.

ART. XIII. The present convention is concluded for the period of ten years from the day of the exchange of the ratifications, and if, one year before the expiration of that period, neither of the contracting parties shall have announced, by an official notification, its intention to the other to arrest the operations of the said convention, it shall continue binding for twelve months longer, and so on, from year to year, until the expiration of the twelve months which will follow a similar declaration, whatever the time at which it may take place.

ART. XIV. This convention shall be submitted on both sides to the approval and ratification of the respective competent authorities, and the ratification shall be exchanged at Washington as soon as circumstances shall admit.

In faith whereof, the respective Plenipotentiaries have signed the above articles, and have thereunto affixed their seals.

Done in quadruplicate at Bloemfonten this 22d day of December, in the year of our Lord one thousand eight hundred and seventy-one.

[L. s.]            W. W. EDGCOMB.

[L. s.]            F. K. HOHNE.

#### XXVII. ECUADOR, JUNE 28, 1872.

The United States of America and the Republic of Ecuador, having deemed it conducive to the better administration of justice, and the prevention of crime within their respective territories, that all persons convicted of, or accused of the crimes enumerated below, being fugitives from justice, shall be, under certain circumstances, reciprocally delivered up, have resolved to conclude a treaty upon the subject; and the President of the United States has for this purpose named Rumsey Wing, a citizen of the United States, and their Minister Resident in Ecuador, as Plenipotentiary on the part of the United States, and the President of Ecuador has named Francisco Javier Leon, Minister of the Interior and of Foreign Affairs, as Plenipotentiary on the part of Ecuador:

Who, having reciprocally communicated their full powers, and the same having been found in good and due form, have agreed upon the following articles, viz.:

ARTICLE I. The Government of the United States and the Government of Ecuador mutually agree to deliver up such persons as may have been convicted of or may be accused of the crimes set forth in the following article, committed within the jurisdiction of one of the contracting parties,

and who may have sought refuge, or be found within the territory of the other; it being understood that this is only to be done when the criminality shall be proved in such manner, that, according to the laws of the country where the fugitive or accused may be found, such persons might be lawfully arrested and tried, had the crime been committed within its jurisdiction.

ART. II. Persons convicted of or accused of any of the following crimes shall be delivered up, in accordance with the provisions of this treaty:

1. Murder, including assassination, parricide, infanticide and poisoning.
2. The crime of rape, arson, piracy and mutiny on ship-board, when the crew, or a part thereof, by fraud or violence against the commanding officer, have taken possession of the vessel.
3. The crime of burglary, this being understood as the act of breaking or forcing an entrance into another's house with intent to commit any crime; and the crime of robbery, this being defined as the act of taking from the person of another goods or money with criminal intent, using violence or intimidation.
4. The crime of forgery, which is understood to be the willful use or circulation of forged papers or public documents.
5. The fabrication or circulation of counterfeit money, either coin or paper, of public bonds, bank bills and securities, and in general, of any kind of titles to or instruments of credit, the counterfeiting of stamps, dies, seals, and marks of the State, and of the administrative authorities and the sale or circulation thereof.
6. Embezzlement of public property, committed within the jurisdiction of either party, by public officers or depositaries.

ART. III. The stipulations of this treaty shall not be applicable to crimes or offenses of a political character, and the person or persons delivered up, charged with the crimes specified in the foregoing article, shall not be prosecuted for any crime committed previously to that for which his or their extradition may be asked.

ART. IV. If the person whose extradition may have been applied for, in accordance with the stipulations of the present treaty, shall have been arrested for offenses committed in the country where he has sought refuge, or if he shall have been sentenced therefor, his extradition may be deferred until his acquittal, or the expiration of the term for which he shall have been sentenced.

ART. V. Requisitions for the extradition of fugitives from justice shall be made by the respective diplomatic agents of the contracting parties, or, in case of the absence of these from the country or its capital, they may be made by superior consular officers. If the person whose extradition is asked for shall have been convicted of a crime, the requisition must be accompanied by a copy of the sentence of the court that has convicted him, authenticated under its seal, and an attestation of the official character of the judge who has signed it, made by the proper executive authority; also by

an authentication of the latter by the Minister or Consul of the United States or Ecuador, respectively. On the contrary, however, when the fugitive is merely charged with crime, a duly authenticated copy of the warrant for his arrest in the country where the crime has been committed, and of any evidence in writing upon which such warrant may have been issued, must accompany the aforesaid requisition. The President of the United States, or the proper executive authority of Ecuador, may then order the arrest of the fugitive, in order that he may be brought before the judicial authority which is competent to examine the question of extradition. If, then, according to the evidence and the law, it be decided that the extradition is due in conformity with this treaty, the fugitive shall be delivered up, according to the forms prescribed in such cases.

ART. VI. The expenses of the arrest, detention, and transportation of persons claimed shall be paid by the Government in whose name the requisition shall have been made.

ART. VII. This treaty shall continue in force for ten (10) years from the day of the exchange of ratifications; but in case neither party shall have given to the other one (1) year's previous notice of its intention to terminate the same, then this treaty shall continue in force for ten (10) years longer and so on.

The present treaty shall be ratified, and the ratifications exchanged in the capital of Ecuador, within two months from the day on which the session of the coming Congress of Ecuador shall terminate, which will be in October, 1873.

In testimony whereof, the respective Plenipotentiaries have signed the present treaty in duplicate, and have hereunto affixed their seals.

Done in the city of Quito, capital of the Republic of Ecuador, this twenty-eighth day of June, one thousand eight hundred and seventy-two.

[SEAL.]

RUMSEY WING.

[SEAL.]

FRANCISCO JAVIER LEON.

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#### XXVIII. THE OTTOMAN EMPIRE, AUGUST 11, 1874.

The United States of America and His Imperial Majesty the Sultan, having judged it expedient, with a view to the better administration of justice and to the prevention of crimes within their respective territories and jurisdiction, that persons convicted of, or charged with the crimes hereinafter specified, and being fugitives from justice, should, under certain circumstances, be reciprocally delivered up, have resolved to conclude a convention for that purpose, and have appointed as their Plenipotentiaries: The President of the United States, Geo. H. Boker, Minister Resident of the United States of America near the Sublime Porte; and His Imperial Majesty the Sultan, His Excellency Aarifi Pasha, his Minister for Foreign Affairs; who, after reciprocal communication of their full powers, found in good and due form, have agreed upon the following articles, to-wit:

ARTICLE I. The Government of the United States and the Ottoman Government mutually agree to deliver up persons who, having been convicted of or charged with the crimes specified in the following article, committed within the jurisdiction of one of the contracting parties, shall seek an asylum or be found within the territories of the other: *Provided*, That this shall only be done upon such evidence of criminality as, according to the laws of the place where the fugitive or person so charged shall be found, would justify his or her apprehension and commitment for trial, if the crime had been there committed.

ART. II. Persons shall be delivered up who shall have been convicted of, or be charged, according to the provisions of this convention, with any of the following crimes:

1. Murder, comprehending the crimes designated by the terms of parricide, assassination, poisoning, and infanticide.

2. The attempt to commit murder.

3. The crimes of rape, arson, piracy, and mutiny on board a ship, whenever the crew, or part thereof, by fraud or violence against the commander, have taken possession of the vessel.

4. The crime of burglary, defined to be the action of breaking and entering by night into the house of another with the intent to commit felony; and the crime of robbery, defined to be the action of feloniously and forcibly taking from the person of another goods or money, by violence or putting him in fear.

5. The crime of forgery, by which is understood the utterance of forged papers, the counterfeiting of public, sovereign, or government acts.

6. The fabrication or circulation of counterfeit money, either coin or paper, of public bonds, bank notes, and obligations, and in general, of all things, being titles and instruments of credit, the counterfeiting of seals, dies, stamps, and marks of State and public administrations, and the utterance thereof.

7. The embezzlement of public moneys committed within the jurisdiction of either party, by public officers or depositors.

8. Embezzlement by any person or persons hired or salaried, to the detriment of their employers, when these crimes are subject to infamous punishment.

ART. III. The provisions of this treaty shall not apply to any crime or offense of a political character, and the person or persons delivered up for the crimes enumerated in the preceding article shall in no case be tried for any ordinary crime, committed previously to that for which his or their surrender is asked.

ART. IV. If the person whose surrender may be claimed, pursuant to the stipulations of the present treaty, shall have been arrested for the commission of offenses in the country where he has sought an asylum, or shall have been convicted thereof, his extradition may be deferred until he shall have been acquitted or have served the term of imprisonment to which he may have been sentenced.

ART. V. Requisitions for the surrender of fugitives from justice shall be made by the respective diplomatic agents of the contracting parties, or, in the event of the absence of these from the country or its seat of government, they may be made by superior consular officers. If the person whose extradition may be asked for shall have been convicted of a crime, a copy of the sentence of the court in which he may have been convicted, authenticated under its seal, and an attestation of the official character of the judge by the proper executive authority, and of the latter by the Minister or Consul of the United States or of the Sublime Porte, respectively, shall accompany the requisition. When, however, the fugitive shall have been merely charged with crime, a duly authenticated copy of the warrant for his arrest in the country where the crime may have been committed, or of the depositions upon which such warrant may have been issued, must accompany the requisition as aforesaid. The President of the United States or the proper executive authority in Turkey may then issue a warrant for the apprehension of the fugitive, in order that he may be brought before the proper judicial authority for examination. If it should then be decided that, according to law and the evidence, the extradition is due, pursuant to the treaty, the fugitive may be given up according to the forms prescribed in such cases.

ART. VI. The expenses of the arrest, detention and transportation of the persons claimed shall be paid by the government in whose name the requisition has been made.

ART. VII. Neither of the contracting parties shall be bound to deliver up its own citizens under the stipulations of this treaty.

ART. VIII. This convention shall continue in force during five (5) years from the day of exchange of ratification, but if neither party shall have given to the other six (6) months' previous notice of its intention to terminate the same, the convention shall remain in force five years longer, and so on.

The present convention shall be ratified, and the ratifications exchanged at Constantinople, within twelve (12) months, and sooner if possible.

In witness whereof, the respective Plenipotentiaries have signed the present convention in duplicate, and have thereunto affixed their seals.

Done at Constantinople, the eleventh day of August, one thousand eight hundred and seventy-four.

[L. s.] GEO. H. BOKER.

[L. s.] A. AARIFI.

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XXIX. SPAIN, JANUARY 5, 1877.

The United States of America and His Majesty the King of Spain, having judged it expedient, with a view to the better administration of justice and the prevention of crime within their respective territories and jurisdictions, that persons charged with or convicted of the crimes hereinafter

enumerated, and being fugitives from justice, should, under certain circumstances, be reciprocally delivered up, have resolved to conclude a convention for that purpose, and have appointed as their Plenipotentiaries: The President of the United States, Caleb Cushing, the Envoy Extraordinary and Minister Plenipotentiary of the United States near the Government of Spain, and His Majesty the King of Spain, His Excellency Don Fernando Caldeiron y Collantes, his Minister of State, Knight Grand Cross of the Royal and distinguished Order of Carlos Tercero, of those of Leopold of Austria and of Belgium, of that of our Lord Jesus Christ of Portugal, of the Saviour of Greece, of the Holy Sepulchre, and of the Nishan Iftijar of Tunis; who, after having communicated to each other their respective full powers, found in good and due form, have agreed upon and concluded the following articles:

ARTICLE I. It is agreed that the Government of the United States and the Government of Spain shall, upon mutual requisition duly made as herein provided, deliver up to justice all persons who may be charged with, or who have been convicted of, any of the crimes specified in Article II of this convention, committed within the jurisdiction of one of the contracting parties, while said persons were actually within such jurisdiction when the crime was committed, and who shall seek an asylum or shall be found within the territories of the other: *Provided*, That such surrender shall take place only upon such evidence of criminality as, according to the laws of the place where the fugitive or person so charged shall be found, would justify his apprehension and commitment for trial, if the crime or offense had been there committed.

ART. II. Persons shall be delivered up according to the provisions of this convention who shall have been charged with or convicted of any of the following crimes:

1. Murder, comprehending the crimes designated by the terms of paricide, assassination, poisoning or infanticide.
2. The attempt to commit murder.
3. Rape.
4. Arson.
5. Piracy or mutiny on board ship when the crew or other persons on board, or part thereof, have, by fraud or violence against the commander, taken possession of the vessel.
6. Burglary, defined to be the act of breaking and entering into the house of another in the night-time with intent to commit a felony therein.
7. The act of breaking and entering the offices of the Government and public authorities, or the offices of banks, banking-houses, savings banks, trust companies, insurance companies, with intent to commit a felony therein.
8. Robbery, defined to be the felonious and forcible taking, from the person of another, goods or money by violence or by putting him in fear.
9. Forgery, or the utterance of forged papers.

10. The forgery or falsification of the official acts of the Government or public authority, including courts of justice, or the uttering or fraudulent use of any of the same.

11. The fabrication of counterfeit money, whether coin or paper, counterfeit titles or coupons of public debt, bank-notes or other instruments of public credit; of counterfeit seals, stamps, dies and marks of State or public administrations, and the utterance, circulation, or fraudulent use of any of the above-mentioned objects.

12. The embezzlement of public funds, committed within the jurisdiction of one or the other party, by public officers or depositaries.

13. Embezzlement by any person or persons, hired or salaried, to the detriment of their employers, when these crimes are subject to infamous punishment.

14. Kidnapping, defined to be the detention of a person or persons in order to exact money from them or for any other unlawful end.

ART. III. The provisions of this convention shall not import claim of extradition for any crime or offense of a political character, nor for acts connected with such crimes or offenses; and no person surrendered by or to either of the contracting parties in virtue of this convention shall be tried or punished for any political crime or offense, nor for any act connected therewith, committed previously to the extradition.

ART. IV. No person shall be subject to extradition in virtue of this convention for any crime or offense committed previous to the exchange of the ratifications hereof; and no person shall be tried for any crime or offense other than that for which he was surrendered, unless such crime be one of those enumerated in Article II, and shall have been committed subsequent to the exchange of the ratifications hereof.

ART. V. A fugitive criminal shall not be surrendered under the provisions hereof when, from lapse of time or other lawful cause, according to the laws of the place within the jurisdiction of which the crime was committed, the criminal is exempt from prosecution or punishment for the offense for which the surrender is asked.

ART. VI. If a fugitive criminal whose surrender may be claimed pursuant to the stipulations hereof be actually under prosecution, out on bail or in custody for a crime or offense committed in the country where he has sought asylum, or shall have been convicted thereof, his extradition may be deferred until such proceedings be determined, and until such criminal shall have been set at liberty in due course of law.

ART. VII. If a fugitive criminal, claimed by one of the parties hereto, shall be also claimed by one or more powers, pursuant to treaty provisions, on account of crimes committed within their jurisdiction, such criminal shall be delivered in preference, in accordance with that demand which is the earliest in date.

ART. VIII. Neither of the contracting parties shall be bound to deliver up its own citizens or subjects under the stipulations of this convention.

ART. IX. The expenses of the arrest, detention, examination, and transportation of the accused shall be paid by the government which has preferred the demand for extradition.

ART. X. Every thing found in the possession of the fugitive criminal at the time of his arrest which may be material as evidence in making proof of the crime shall, so far as practicable, be delivered up with his person at the time of the surrender. Nevertheless, the rights of a third party with regard to the articles aforesaid shall be duly respected.

ART. XI. The stipulations of this convention shall be applicable to all foreign or colonial possessions of either of the two contracting parties.

Requisitions for the surrender of fugitives from justice shall be made by the respective diplomatic agents of the contracting parties. In the event of the absence of such agents from the country or its seat of government, or where extradition is sought from a colonial possession of one of the contracting parties, requisition may be made by superior consular officers.

It shall be competent for such representatives or such superior consular officers to ask and obtain a mandate or preliminary warrant of arrest for the person whose surrender is sought, whereupon the judges and magistrates of the two Governments shall, respectively, have power and authority, upon complaint made under oath, to issue a warrant for the apprehension of the person charged, in order that he or she may be brought before such judge or magistrate that the evidence of criminality may be heard and considered; and if, on such hearing, the evidence be deemed sufficient to sustain the charge, it shall be the duty of the examining judge or magistrate to certify the same to the proper executive authority, that a warrant may issue for the surrender of the fugitive.

If the fugitive criminal shall have been convicted of the crime for which his surrender is asked, a copy of the sentence of the court before which such conviction took place, duly authenticated, shall be produced. If however, the fugitive is merely charged with crime, a duly authenticated copy of the warrant of arrest in the country where the crime was committed, and of the depositions upon which such warrant may have been issued, shall be produced with such other evidence or proof as may be deemed competent in the case.

ART. XII. This convention shall continue in force from the day of the exchange of the ratifications thereof, but either party may, at any time, terminate the same on giving to the other six months' notice of its intention so to do.

In testimony whereof, the respective Plenipotentiaries have signed the present convention in triplicate, and have hereunto affixed their seals.

Done at the city of Madrid, in triplicate, English and Spanish, this fifth day of January, in the year of our Lord one thousand eight hundred and seventy-seven.

[SEAL.]      CALEB CUSHING.

[SEAL.]      FERNANDO CALDERON y COLLANTES.



## XXX. THE NETHERLANDS, MAY 22, 1880.

The United States of America and His Majesty the King of the Netherlands, having judged it expedient, with a view to the better administration of justice and the prevention of crime within their respective territories and jurisdictions, that persons charged with, or convicted of, the crimes herein-after enumerated, and being fugitives from justice, should under certain circumstances be reciprocally delivered up, have resolved to conclude a convention for that purpose, and have appointed as their Plenipotentiaries: The President of the United States, William Maxwell Evarts, Secretary of State of the United States, and His Majesty the King of the Netherlands, Gonkheer Rudolph Alexandre August Edward von Pestel, Knight of the Order of the Netherlands Lion, His Majesty's Minister Resident in the United States; who after having communicated to each other their respective full powers, found in good and due form, have agreed upon and concluded the following articles:

ARTICLE I. The United States of America and His Majesty the King of the Netherlands reciprocally engage to deliver up to justice all persons convicted of or charged with any of the crimes or offenses enumerated in the following article, committed within the respective jurisdiction of the United States of America or of the Kingdom of the Netherlands, exclusive of the Colonies thereof, such persons, being actually within such jurisdiction when the crime or offense was committed, who shall seek an asylum or shall be found within the jurisdiction of the other, exclusive of the Colonies of the Netherlands: *Provided*, That this shall only be done upon such evidence of criminality as, according to the laws of the place where the fugitive so charged shall be found, would justify his apprehension and commitment for trial, if the crime or offense had been there committed.

ART. II. Persons shall be delivered up, according to the provisions of this convention, who shall have been charged with, or convicted of, any of the following crimes:

1. Murder, comprehending the crimes of assassination, parricide, infanticide, and poisoning.
2. The attempt to commit murder.
3. Rape.
4. Arson.
5. Burglary, or the corresponding crime in the Netherlands law under the description of thefts committed in an inhabited house by night, and by breaking in, by climbing or forcibly.
6. The act of breaking into and entering public offices, or the offices of banks, banking-houses, savings-bank, trust companies, or insurance companies, with intent to commit theft therein, and also the thefts resulting from such act.
7. Robbery, or the corresponding crime punished in the Netherlands law under the description of theft committed with violence or by means of threats.

8. Forgery, or the utterance of forged papers, including the forgery or falsification of official acts of the Government or public authority or courts of justice affecting the title or claim to money or property.

9. The counterfeiting, falsifying, or altering of money, whether coin or paper, or of bank notes, or instruments of debt created by National, State or Municipal Governments, or coupons thereof, or of seals, stamps, dies, or marks of State, or the utterance or circulation of the same.

10. Embezzlement by public officers charged with the custody or receipt of public funds.

11. Embezzlement by any person or persons hired or salaried to the detriment of their employers, where the offense is subject to punishment by the law of the Netherlands as *abus de confiance*, if extradition is demanded by the United States, or is subject to punishment as a crime in the United States, if extradition is demanded by the Netherlands.

ART. III. The provisions of this convention shall not apply to any crime or offense of a political character, nor to acts connected with such crimes or offenses; and no person surrendered under the provision hereof shall in any case be tried or punished for a crime or offense of a political character, nor for any act connected therewith, committed previously to his extradition.

ART. IV. The present convention shall not apply to any crime or offense committed previous to the exchange of the ratifications hereof, and no person shall be tried or punished after surrender for any crime or offense other than that for which he was surrendered if committed previous to his surrender, unless such crime or offense be one of those enumerated in Article II hereof, and shall have been committed subsequent to the exchange of ratifications.

ART. V. A fugitive criminal shall not be surrendered under the provisions hereof when, by lapse of time, he is exempt from prosecution or punishment for the crime or offense for which the surrender is asked, according to the laws of the country from which the extradition is demanded, or when his extradition is asked for the same crime or offense for which he has been tried, convicted or acquitted in that country, or so long as he is under prosecution for the same.

ART. VI. If a fugitive criminal, whose extradition may be claimed pursuant to the stipulations hereof, be actually under prosecution for a crime or offense in the country where he has sought asylum, or shall have been convicted thereof, his extradition may be deferred until such proceedings be terminated, and until such criminal shall be set at liberty in due course of law.

ART. VII. If a fugitive criminal claimed by one of the parties hereto shall also be claimed by one or more powers, pursuant to treaty provisions on account of crimes committed within their jurisdiction, such criminal shall be delivered in preference in accordance with that demand which is the earliest in date.

ART. VIII. Neither of the contracting parties shall be bound to deliver up, under the stipulations of this convention, its own citizens or subjects.

ART. IX. The expenses of the arrest, detention, examination and transportation of the accused shall be paid by the government which has preferred the demand for extradition.

ART. X. Every thing found in the possession of the fugitive criminal, at the time of his arrest, which may be material as evidence in making proof of the crime, shall, so far as practicable according to the laws or practice in the respective countries, be delivered up with his person at the time of surrender. Nevertheless, the rights of third parties, with regard to all such articles, shall be duly respected.

ART. XI. Requisitions for the surrender of fugitives from justice shall be made by the respective diplomatic agents of the contracting parties. In the event of the absence of such agents from the country, or its seat of government, requisition may be made by consular officers.

When the person whose extradition shall have been asked, shall have been convicted of the crime, a copy of the sentence of the court in which he may have been convicted, authenticated under its seal and accompanied by an attestation of the official character of the judge by the proper authority, shall be furnished.

If, however, the fugitive is merely charged with crime, a duly authenticated copy of the warrant of arrest in the country where the crime was committed, and of the depositions upon which such warrant may have been issued, shall be produced, authenticated as above provided, with such other evidence or proof as may be deemed competent in the case.

If, after an examination, it shall be decided, according to the law and evidence, that extradition is due pursuant to this convention, the fugitive shall be surrendered according to the forms of law prescribed in such cases.

ART. XII. The present convention shall take effect on the twentieth day after its promulgation in the manner prescribed by the laws of the respective countries. After the convention shall so have gone into operation, it shall continue until one of the two parties shall give to the other six months' notice of its desire to terminate it.

This convention shall be ratified, and the ratifications shall be exchanged at Washington or the Hague, as soon as possible.

In testimony whereof, the respective Plenipotentiaries have signed the present convention, in duplicate, and have hereunto affixed their seals.

Done at Washington, in the English and Dutch languages, on the twenty-second day of May, in the year of our Lord eighteen hundred and eighty.

[SEAL.]

WILLIAM MAXWELL EVARTS.

[SEAL.]

RUDOLPH VON PESTEL.

## XXXI. BELGIUM, JUNE 13, 1882.

The United States of America and His Majesty the King of the Belgians, having judged it expedient with a view to the better administration of justice, and the prevention of crime within their respective territories and jurisdictions, that persons charged with or convicted of the crimes and offenses hereinafter enumerated, and being fugitives from justice, should, under certain circumstances, be reciprocally delivered up, have resolved to conclude a new convention for that purpose, and have appointed as their Plenipotentiaries: The President of the United States, Frederick T. Frelinghuysen, Secretary of State of the United States, and His Majesty the King of the Belgians, Mr. Theodore de Bounder de Melsbroeck, Commander of his Order of Leopold, etc., etc., His Envoy Extraordinary and Minister Plenipotentiary near the Government of the United States; who, after having communicated to each other their respective full powers, found in good and due form, have agreed upon and concluded the following articles:

ARTICLE I. The Government of the United States and the Government of Belgium mutually agree to deliver up persons who, having been charged, as principals or accessories, with or convicted of any of the crimes and offenses specified in the following article, committed within the jurisdiction of one of the contracting parties, shall seek an asylum or be found within the territories of the other: *Provided*, That this shall only be done upon such evidence of criminality as, according to the laws of the place where the fugitive or person so charged shall be found, would justify his or her apprehension and commitment for trial, if the crime had been there committed.

ART. II. Persons shall be delivered up who shall have been convicted of, or be charged, according to the provisions of this convention, with any of the following crimes:

1. Murder, comprehending the crimes designated in the Belgian Penal Code by the terms of parricide, assassination, poisoning and infanticide.

2. The attempt to commit murder.

3. Rape, or attempt to commit rape; bigamy; abortion.

4. Arson.

5. Piracy, or mutiny on shipboard whenever the crew, or part thereof, shall have taken possession of the vessel by fraud or by violence against the commander.

6. The crime of burglary, defined to be the act of breaking and entering by night into the house of another with the intent to commit felony; and the crime of robbery, defined to be the act of feloniously and forcibly taking from the person of another money or goods by violence, or putting him in fear; and the corresponding crimes punished by Belgian laws under the description of thefts committed in an inhabited house by night, and by breaking in by climbing or forcibly, and thefts committed with violence or by means of threats.

7. The crime of forgery, by which is understood the utterance of forged

papers, and also the counterfeiting of public, sovereign, or governmental acts.

8. The fabrication or circulation of counterfeit money, either coin or paper, or of counterfeit public bonds, coupons of the public debt, bank notes, obligations, or, in general, any thing being a title or instrument of credit; the counterfeiting of seals and dies, impressions, stamps, and marks, of State and public administrations, and the utterance thereof.

9. The embezzlement of public moneys committed within the jurisdiction of either party by public officers or depositaries.

10. Embezzlement by any person or persons, hired or salaried, to the detriment of their employers, when the crime is subject to punishment by the laws of the place where it was committed.

11. Willful and unlawful destruction or obstruction of railroads which endangers human life.

12. Reception of articles obtained by means of one of the crimes or offenses provided for by the present convention.

Extradition may also be granted for the attempt to commit any of the crimes above enumerated when such attempt is punishable by the laws of both contracting parties.

ART. III. A person surrendered under this convention shall not be tried or punished in the country to which his extradition has been granted, nor given up to a third power for a crime or offense, not provided for by the present convention and committed previously to his extradition, until he shall have been allowed one month to leave the country after having been discharged; and, if he shall have been tried and condemned to punishment, he shall be allowed one month after having suffered his penalty, or having been pardoned.

He shall moreover not be tried or punished for any crime or offense provided for by this convention committed previous to his extradition, other than that which gave rise to the extradition, without the consent of the Government which surrendered him, which may, if it think proper, require the production of one of the documents mentioned in Article VII of this convention.

The consent of that Government shall likewise be required for the extradition of the accused to a third country; nevertheless such consent shall not be necessary when the accused shall have asked of his own accord to be tried or to undergo his punishment, or when he shall not have left within the space of time above specified the territory of the country to which he has been surrendered.

ART. IV. The provisions of this convention shall not be applicable to persons guilty of any political crime or offense, or of one connected with such a crime or offense. A person who has been surrendered on account of one of the common crimes or offenses mentioned in Article II, shall consequently, in no case, be prosecuted and punished in the State to which his extradition has been granted on account of a political crime or offense

committed by him previously to his extradition, or on account of an act connected with such political crime or offense, unless he has been at liberty to leave the country for one month after having been tried, and, in case of condemnation, for one month after having suffered his punishment, or having been pardoned.

An attempt against the life of the head of a foreign Government, or against that of any member of his family when such attempt comprises the act either of murder, or assassination, or of poisoning, shall not be considered a political offense or an act connected with such an offense.

ART. V. Neither of the contracting parties shall be bound to deliver up its own citizens or subjects under the stipulations of this convention.

ART. VI. If the person, whose surrender may be claimed pursuant to the stipulations of the present treaty, shall have been arrested for the commission of offenses in the country where he has sought an asylum, or shall have been convicted thereof, his extradition may be deferred until he shall have been acquitted, or have served the term of imprisonment to which he may have been sentenced.

ART. VII. Requisitions for the surrender of fugitives from justice shall be made by the respective diplomatic agents of the contracting parties, or, in the event of the absence of these from the country or its seat of government, they may be made by the superior consular officers.

If the person whose extradition may be asked for shall have been convicted of a crime or offense, a copy of the sentence of the court in which he may have been convicted, authenticated under its seal, and attestation of the official character of the judge by the proper executive authority, and of the latter by the Minister or Consul of the United States or of Belgium, respectively, shall accompany the requisition. When, however, the fugitive shall have been merely charged with crime, a duly authenticated copy of the warrant for his arrest in the country where the crime may have been committed, and of the depositions upon which such warrant may have been issued, must accompany the requisition as aforesaid.

The President of the United States, or, the proper executive authority in Belgium may then issue a warrant for the apprehension of the fugitive, in order that he may be brought before the proper judicial authority for examination. If it should then be decided that, according to the law and the evidence, the extradition is due pursuant to the treaty, the fugitive may be given up according to the forms prescribed in such cases.

ART. VIII. The expenses of the arrest, detention, and transportation of the persons claimed shall be paid by the Government in whose name the requisition has been made.

ART. IX. Extradition shall not be granted, in pursuance of the provisions of this convention, if legal proceedings or the enforcement of the penalty for the act committed by the person claimed has become barred by limitation, according to the laws of the country to which the requisition is addressed.

ART. X. All articles found in the possession of the accused party and obtained through the commission of the acts with which he is charged, or that may be used as evidence of the crime for which his extradition is demanded, shall be seized if the competent authority shall so order, and shall be surrendered with his person.

The rights of third parties to the articles so found shall, nevertheless, be respected.

ART. XI. The present convention shall take effect thirty days after the exchange of ratifications.

After it shall have taken effect, the convention of March 19, 1874, shall cease to be in force and shall be superseded by the present convention which shall continue to have binding force for six months after a desire for its termination shall have been expressed in due form by one of the two Governments to the other.

It shall be ratified, and its ratification shall be exchanged at Washington as soon as possible.

In witness whereof the respective Plenipotentiaries have signed the above articles, both in the English and French languages, and they have thereunto affixed their seals.

Done in duplicate, at the city of Washington, this thirteenth day of June, one thousand eight hundred and eighty-two.

[SEAL.]

FREDERICK T. FRELINGHUYSEN.

[SEAL.]

THOR de BOUNDER de MELSBROECK.

#### XXXII. SPAIN (SUPPLEMENTARY), AUGUST 7, 1882.

The President of the United States of America and His Majesty the King of Spain, being satisfied of the propriety of adding some articles to the extradition convention concluded between the United States and Spain on the fifth day of January, 1877, with a view to the better administration of justice and the prevention of crime within their respective territories and jurisdictions, have resolved to conclude a supplementary convention for that purpose, and have appointed as their Plenipotentiaries:

The President of the United States, Frederick T. Frelinghuysen, Esquire, Secretary of State of the United States, and His Majesty the King of Spain, His Excellency Don Francisco Barca, Knight Grand Cross of the Royal American Order of Isabel La Catolica, His Majesty's Envoy Extraordinary and Minister Plenipotentiary near the Government of the United States; who, after having reciprocally exhibited their full powers, found in good and due form, have agreed upon and concluded the following articles:

ARTICLE I. Paragraph 5 of Article II of the aforesaid convention of January 5, 1877, is abrogated and the following substituted:

5. Crimes committed at sea:

(a.) Piracy as commonly known and defined by the law of nations.

(b.) Destruction or loss of a vessel caused intentionally, or conspiracy and attempt to bring about such destruction or loss, when committed by any person or persons on board of said vessel, on the high seas.

(c.) Mutiny or conspiracy by two or more members of the crew or other persons on board of a vessel on the high seas, for the purpose of rebelling against the authority of the captain or commander of such vessel, or by fraud or violence taking possession of such vessel.

Paragraph 12 of said Article II is amended to read as follows:

12. The embezzlement or criminal malversation of public funds committed within the jurisdiction of one or the other party, by public officers or depositaries.

Paragraph 13 of said article II is likewise modified to read as follows:

13. Embezzlement by any person or persons hired, salaried, or employed to the detriment of their employers or principals, when the crime or offense is punishable by imprisonment or other corporal punishment by the laws of both countries.

Paragraph 14 of said Article II is likewise modified to read as follows:

14. Kidnapping of minors or adults, defined to be the abduction or detention of a person or persons, in order to exact money from them, or from their families, or for any other unlawful end.

ART. II. In continuation and as forming part of Article II of the aforesaid convention of January 5, 1877, shall be added the following paragraphs:

15. Obtaining by threats of injury, or false devices, money, valuables, or other personal property, and the purchase of the same with the knowledge that they have been so obtained, when the crimes or offenses are punishable by imprisonment or other corporal punishment by the laws of both countries.

16. Larceny, defined to be the theft of effects, personal property or money, of the value of twenty-five dollars or more.

17. Slave-trade, according to the laws of each of the two countries respectively.

18. Complicity in any of the crimes or offenses enumerated in the convention of January 5, 1877, as well as in these additional articles, provided that the persons charged with such complicity be subject as accessories to imprisonment or other corporal punishment by the laws of both countries.

ART. III. After article XI of the aforesaid convention of January 5, 1877, shall be inserted the two following articles:

#### ARTICLE XII.

If when a person accused shall have been arrested in virtue of the mandate or preliminary warrants of arrest issued by the competent authority as provided in Article XI hereof, and been brought before a judge or magistrate to the end of the evidence of his or her guilt being heard and examined as hereinbefore provided, it shall appear that the mandate or preliminary warrant of arrest has been issued in pursuance of a request or declaration received by telegraph from the Government asking for the extradition, it shall be competent for the judge or magistrate at his discre-



tion to hold the accused for a period not exceeding twenty-five days, so that the demanding Government may have opportunity to lay before such judge or magistrate legal evidence of the guilt of the accused; and if, at the expiration of said period of twenty-five days, such legal evidence shall not have been produced before such judge or magistrate, the person arrested shall be released; provided that the examination of the charges preferred against such accused person shall not be actually going on.

#### ARTICLE XIII.

In every case of a request made by either of the two contracting parties for the arrest, detention or extradition of fugitive criminals in pursuance of the convention of January 5, 1877, and of these additional articles, the legal officers or fiscal ministry of the country where the proceedings of extradition are had, shall assist the officers of the Government demanding the extradition, before the respective judges and magistrates, by every legal means within their or its power; and no claim whatever for compensation for any of the services so rendered shall be made against the Government demanding the extradition; provided, however, that any officer or officers of the surrendering Government, so giving assistance, who shall, in the usual course of their duty, receive no salary or compensation other than specific fees for services performed, shall be entitled to receive from the Government demanding the extradition the customary fees for the acts or services performed by them, in the same manner and to the same amount as though such acts or services had been performed in ordinary criminal proceedings under the laws of the country of which they are officers.

ART. IV. All the provisions of the aforesaid convention of the 5th of January, 1877, not abrogated by these additional articles, shall apply to these articles with the same force as to the said original convention.

This additional convention shall be ratified and the ratifications exchanged at Washington as soon as may be practicable; and upon the exchange of ratifications it shall have immediate effect and form a part of the aforesaid convention of January 5, 1877, and continue and be terminable in like manner therewith.

In testimony whereof the respective Plenipotentiaries have signed the present additional convention, in duplicate, in the English and Spanish languages, and have hereunto affixed their seals.

Done at the city of Washington, this 7th day of August, in the year of our Lord one thousand eight hundred and eighty-two.

FREDK. T. FRELINGHUYSEN. [SEAL.]  
FRANCO BARCA. [SEAL.]

## II.

# EXTRADITION LAWS OF THE UNITED STATES.

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These laws are divided into three classes: the first embracing those laws that relate to the extradition of fugitive criminals in pursuance of treaties of the United States; the second, those that relate to the extradition of fugitive criminals between the States and Territories of the United States, and between these States and Territories and the District of Columbia; and the third, those that relate to the capture and surrender of deserting seamen.

### I. INTERNATIONAL EXTRADITION.

The laws regulating the extradition of fugitives from justice under treaties of the United States are of two classes; the first relating to such extradition *from* the United States; and the second, to extradition *to* the United States. The laws contained in the former of these classes, as found in the Revised Statutes of the United States, are as follows :

1. **EXAMINING MAGISTRATES.** SEC. 5270. Whenever there is a treaty or convention for extradition between the Government of the United States and any foreign government, any justice of the Supreme Court, circuit judge, district judge, commissioner authorized so to do by any of the courts of the United States, or judge of a court of record of general jurisdiction of any State, may, upon complaint, made under oath, charging any person found within the limits of any State, district or territory, with having committed within the jurisdiction of any such foreign government any of the crimes provided for by such treaty or convention, issue his warrant for the apprehension of the person so charged, that he may be brought before such justice, judge or commissioner, to the end that the evidence of criminality may be heard and considered. If, on such hearing, he deems the evidence sufficient to sustain the charge under the provisions of the proper treaty or convention, he shall certify the same, together with a copy of all the testimony taken before him, to the Secretary of State, that a warrant may issue upon the requisition of the proper authorities of such foreign government for the surrender of such person according to the stipulations of the treaty or convention; and he shall issue his warrant for the commitment of the person so charged to the proper jail, there to remain until such surrender shall be made.

2. **DOCUMENTARY PROOF.** SEC. 5271, as amended by the Act of June 19, 1876. In every case of complaint and of a hearing upon the return of a warrant of arrest, any depositions, warrants or other papers offered in evidence shall be admitted and received for the purpose of such hearing, if they shall be properly and legally authenticated so as to entitle them to be received as evidence of the criminality of the person so apprehended, by the tribunals of the foreign country from which the accused party shall have escaped, and copies of any such depositions, warrants or other papers, shall, if authenticated according to the law of such foreign country, be in like manner received as evidence; and the certificate of the principal diplomatic or consular officer of the United States resident in such foreign country shall be proof that any such deposition, warrant or other paper, or copy thereof, is authenticated in the manner required by this section.

3. **EXECUTIVE DELIVERY.** SEC. 5272. It shall be lawful for the Secretary of State, under his hand and seal of office, to order the person so committed to be delivered to such person as shall be authorized, in the name and on behalf of such foreign Government, to be tried for the crime of which such person shall be so accused, and such person shall be delivered up accordingly; and it shall be lawful for the person so authorized to hold such person in custody and to take him to the territory of such foreign government, pursuant to such treaty. If the person so accused shall escape out of any custody to which he shall be committed, or to which he shall be delivered, it shall be lawful to retake such person in the same manner as any person accused of any crime against the laws in force in that part of the United States to which he shall so escape, may be retaken on an escape.

4. **LIMITATION OF TIME.** SEC. 5273. Whenever any person who is committed under this title or any treaty to remain until delivered up in pursuance of a requisition, is not so delivered up and conveyed out of the United States within two calendar months after such commitment, over and above the time actually required to convey the prisoner from the jail to which he was committed, by the readiest way, out of the United States, it shall be lawful for any judge of the United States, or of any State, upon application made to him by or on behalf of the person so committed, and upon proof made to him that reasonable notice of the intention to make such application has been given to the Secretary of State, to order the person so committed to be discharged out of custody, unless sufficient cause is shown to such judge why such discharge ought not to be ordered.

5. **APPLICATION OF THE LAWS.** SEC. 5274. The provisions of this title relating to the surrender of persons who have committed crimes in foreign countries shall continue in force during the existence of any treaty of extradition with any foreign government and no longer.

The laws of the second class, relating to extradition to the United States,

are embraced in the following sections of the Revised Statutes of the United States:

6. **PROTECTION OF THE FUGITIVE.** SEC. 5275. Whenever any person is delivered by any foreign government to an agent of the United States, for the purpose of being brought within the United States and tried for any crime of which he is duly accused, the President shall have power to take all necessary measures for the transportation and safe-keeping of such accused person and for his security against lawless violence, until the final conclusion of his trial for the crimes or offenses specified in the warrant of extradition, and until his final discharge from custody or imprisonment for or on account of such crimes or offenses, and for a reasonable time thereafter, and may employ such portion of the land or naval forces of the United States, or of the militia thereof, as may be necessary for the safe-keeping and protection of the accused.

7. **POWERS OF THE AGENT.** SEC. 5276. Any person duly appointed as agent to receive, in behalf of the United States, the delivery, by a foreign government, of any person accused of crime committed within the jurisdiction of the United States, and to convey him to the place of his trial, shall have all the powers of a marshal of the United States, in the several districts through which it may be necessary for him to pass with such prisoner, so far as such power is requisite for the prisoner's safe-keeping.

8. **PENALTY FOR INTERFERENCE.** SEC. 5277. Every person who knowingly and willfully obstructs, resists or opposes such agent in the execution of his duties, or who rescues or attempts to rescue such prisoner, whether in the custody of the agent or of any officer or person to whom his custody has lawfully been committed, shall be punishable by a fine of not more than one thousand dollars, and by imprisonment for not more than one year.

9. **THE ACT OF AUGUST 3, 1882.** (22 U. S. STAT. AT LARGE, 215).—This act, designed to be supplementary to the provisions contained in the Revised Statutes of the United States, provides as follows:

(1.) *Extradition Practice.* (Sec. 1.)—That all hearings in cases of extradition under treaty stipulation or convention shall be held on land, publicly, and in a room or office easily accessible to the public.

(2.) *Commissioners' Fees.* (Sec. 2.)—That the following shall be the fees paid to commissioners in cases of extradition under treaty stipulation or convention between the government of the United States and any foreign government, and no other fees or compensation shall be allowed to or received by them:

(a.) For administering an oath, ten cents.

(b.) For taking an acknowledgment, twenty-five cents.

(c.) For taking and certifying depositions to file, twenty cents for each folio.

(d.) For each copy of the same furnished to a party on request, ten cents for each folio.

(e.) For issuing any warrant or writ, and for any other service, the same compensation as is allowed clerks for like services.

(f.) For issuing any warrant under the tenth article of the treaty of August 9, 1842, between the United States and the Queen of the United Kingdom of Great Britain and Ireland, against any person charged with any crime or offense as set forth in said article, two dollars.

(g.) For issuing any warrant under the provision of the convention for the surrender of criminals, between the United States and the King of the French, concluded at Washington, November 9, 1843, two dollars.

(h.) For hearing and deciding upon the case of any person charged with any crime or offense, and arrested under the provisions of any treaty or convention, five dollars a day for the time necessarily employed.

(3.) *Subpoena of Witnesses.* (Sec. 3.) — That on the hearing of any case under a claim of extradition by any foreign government, upon affidavit being filed by the person charged setting forth that there are witnesses whose evidence is material to his defense, that he cannot safely go to trial without them, what he expects to prove by each of them, and that he is not possessed of sufficient means, and is actually unable to pay the fees of such witnesses, the judge or commissioner before whom such claim for extradition is heard may order that such witnesses be subpoenaed; and in such cases the costs incurred by the process and the fees of witnesses shall be paid in the same manner that similar fees are paid in the case of witnesses subpoenaed in behalf of the United States.

(4.) *Witness Fees, etc., certified.* (Sec. 4.) — That all witness fees and costs of every nature in cases of extradition, including the fees of the commissioner, shall be certified by the judge or commissioner before whom the hearing shall take place to the Secretary of State of the United States, who is hereby authorized to allow the payment thereof out of the appropriation to defray the expenses of the judiciary; and the Secretary of State shall cause the amount of said fees and costs so allowed to be reimbursed to the government of the United States by the foreign government by whom the proceedings for extradition may have been instituted.

(5.) *The Evidence on the Hearing.* (Sec. 5.) — That in all cases where any depositions, warrants, or other papers, or copies thereof, shall be offered in evidence upon the hearing of any extradition case under Title 66 of the Revised Statutes of the United States, such depositions, warrants, and other papers, or the copies thereof, shall be received and admitted as evidence on such hearing, for all the purposes of such hearing, if they shall be properly and legally authenticated, so as to entitle them to be received for similar purposes by the tribunals of the foreign country from which the accused party shall have escaped, and the certificate of the principal diplomatic or consular officer of the United States resident in such foreign country, shall be proof that any deposition, warrant or other paper, or copies thereof, so offered, are authenticated in the manner required by this act.

(6.) *Repealing Clause.* The act approved June 19, 1876, entitled "An act

to amend section 5271 of the Revised Statutes of the United States," and so much of said section 5271 of the Revised Statutes of the United States as is inconsistent with the provisions of this act, are hereby repealed.

(II) INTER-STATE AND TERRITORIAL EXTRADITION.

The laws relating to extradition in this form are contained in the following sections of the Revised Statutes of the United States:

1. **DELIVERY AND ITS CONDITIONS.** SEC. 5278. Whenever the executive authority of any State or Territory demands any person as a fugitive from justice, of the executive authority of any State or Territory to which such person has fled, and produces a copy of an indictment found, or an affidavit made before a magistrate of any State or Territory, charging the person demanded with having committed treason, felony, or other crime, certified as authentic by the Governor or chief magistrate of the State or Territory from whence the person so charged has fled, it shall be the duty of the executive authority of the State or Territory to which such person has fled to cause him to be arrested and secured, and to cause notice of the arrest to be given to the executive authority making such demand, or to the agent of such authority appointed to receive the fugitive, and to cause the fugitive to be delivered to such agent when he shall appear. If no such agent appears within six months from the time of the arrest, the prisoner may be discharged. All costs or expenses incurred in the apprehending, securing and transmitting such fugitive to the State or Territory making such demand shall be paid by such State or Territory.

2. **THE AGENT AND HIS POWERS.** SEC. 5279. Any agent so appointed who receives the fugitive into his custody shall be empowered to transport him to the State or Territory from which he fled. And every person who, by force, sets at liberty or rescues the fugitive from such agent while so transporting him, shall be fined not more than five hundred dollars or imprisoned not more than one year.

3. **DISTRICT OF COLUMBIA.** To these provisions of law Congress has added section 843 of the Revised Statutes of the United States relating to the District of Columbia, which reads as follows:

In all cases where the laws of the United States provide that fugitives from justice shall be delivered up, the chief justice of the Supreme Court shall cause to be apprehended and delivered up such fugitive from justice who shall be found within the District, in the same manner and under the same regulations as the executive authority of the several States are required to do by the provisions of sections fifty-two hundred and seventy-eight and fifty-two hundred and seventy-nine, title LXVI of the Revised Statutes, "EXTRADITION;" and all executive and judicial officers are required to obey the lawful precepts or other process issued for that purpose, and to aid and assist in such delivery.

## III. EXTRADITION OF DESERTING SEAMEN.

The Government of the United States has entered into treaties with other countries for the mutual restoration of deserting seamen; and for the execution of these treaties, on the part of the United States, Congress has enacted a law, found in section 5280 of the Revised Statutes of the United States, and reading as follows:

On application of a consul or vice-consul of any foreign government having a treaty with the United States stipulating for the restoration of seamen deserting, made in writing, stating that the person therein named has deserted from a vessel of any such government, while in any port of the United States, and on proof by the exhibition of the register of the vessel, ship's roll, or other official document, that the person named belonged, at the time of the desertion, to the crew of such vessel, it shall be the duty of any court, judge, commissioner of any Circuit Court, justice or other magistrate, having competent power to issue warrants, to cause such person to be arrested for examination. If, on examination, the facts stated are found to be true, the person arrested not being a citizen of the United States, shall be delivered up to the consul or vice-consul, to be sent back to the dominions of any such Government, or, on the request and at the expense of the consul or vice-consul, shall be detained until the consul or vice-consul finds an opportunity to send him back to the dominions of any such Government. No person so arrested shall be detained more than two months after his arrest; but at the end of that time shall be set at liberty, and shall not be again molested for the same cause. If any such deserter shall be found to have committed any crime or offense, his surrender may be delayed until the tribunal before which the case shall be depending, or may be cognizable, shall have pronounced its sentence, and such sentence shall have been carried into effect. (See sections 4079-4081.)

Prior to the abolition of slavery in this country by the adoption of the Thirteenth Amendment to the Constitution of the United States, Congress had enacted two acts — one in 1793, and the other in 1850 — providing for the execution of that clause of the Constitution which declares that "no person held to service or labor in one State, under the laws thereof, escaping into another, shall, in consequence of any law or regulation therein, be discharged from such service or labor, but shall be delivered up on claim of the party to whom such service or labor is due." Both of these acts assumed the constitutional power of Congress to legislate for giving effect to this provision of the Constitution. The first of the acts came under the consideration of the Supreme Court of the United States, in *Prigg v. The Commonwealth of Pennsylvania*, 16 Pet. 539, and was held to be constitutional. The second act was considered by the same court, in *Ableman v. Booth*, 21 How. 506, and also held to be constitutional. The State courts of this country, with but few exceptions, accepted the opinion given in these cases as decisive on the question of law, and ruled accordingly when they had occasion to deal with the subject. Mr. Bump, in his Notes of

Constitutional Decisions, p. 298, refers to the leading cases in which the courts, both State and Federal, have given their judgments in respect to the extradition or rendition of fugitive slaves.

Slavery being abolished by the Thirteenth Amendment, the constitutional provision for the capture and return of fugitive slaves is practically dead. There is no law for their capture, and there are no slaves in this country to be captured and returned to their masters. This is one of the beneficent results and compensations arising from the war of the rebellion.

The language of the constitutional provision in respect to fugitive slaves was, in *Boaler v. Cummines*, 1 Amer. Law Reg. 654, held to be applicable to the capture and rendition of fugitive apprentices. They were regarded in that case as coming under the description of persons "held to service or labor in one State," and liable under the acts of Congress of 1793 and 1850, upon their escape into another State, to be captured and restored to the persons to whom such service of labor was due. The provision, even with this construction, is now inoperative, so far as the General Government is concerned, since there is no law to carry it into effect. It remains in the text of the Constitution as an obsolete part of that instrument.



### III.

## EXTRADITION LAWS OF THE STATES.

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#### I. ALABAMA.

[From the Code of Alabama, 1876, pages 861-862; Part Fourth, chapter 1.]

**SECTION 3977 (4849). FUGITIVES FROM OTHER STATES.** Any person charged in any State or Territory of the United States, with treason, felony, or other crime, who shall flee from justice and be found in this State, must, on the demand of the executive authority of the State or Territory from which he fled, be delivered up by the Governor of this State, to be removed to the State or Territory having jurisdiction of such crime.

**SEC. 3978 (4850). WARRANT ISSUED BY MAGISTRATES.** A warrant for the apprehension of such person may be issued by any magistrate who is authorized to issue a warrant of arrest.

**SEC. 3979 (4851). PROCEEDINGS ON ARREST.** The proceedings for the arrest and commitment of the person charged are in all respects similar to those provided in this Code for the arrest and commitment of a person charged with a public offense, except that an exemplified copy of an indictment found, or other judicial proceedings had against him in the State or Territory in which he is charged to have committed the offense, must be received as conclusive evidence before the magistrate.

**SEC. 3980 (4852). COMMITMENT TO PRISON.** If, from the examination, it appears that the person charged has committed the crime alleged, the magistrate must, by warrant reciting the accusation, commit him to jail for a time specified in the warrant, which the magistrate deems reasonable, to enable the arrest of the fugitive to be made under the warrant of the executive of this State, on the requisition of the executive authority of the State or Territory in which he committed the offense, unless he give bail as provided in the next section, or until he is legally discharged.

**SEC. 3981 (4853). BAIL, WHEN TO BE TAKEN.** — The magistrate must, unless the offense with which the fugitive is charged is shown to be an offense punished capitally by the laws of the State in which it was committed, admit the person arrested to bail by bond or undertaking, with sufficient sureties, and in such sum as he deems proper, for his appearance

before him at a time specified in such bond or undertaking, and for his surrender, to be arrested upon the warrant of the Governor of this State.

**SEC. 3982 (4354). WHEN ENTITLED TO DISCHARGE.**—If such person is not arrested under the warrant of the Governor, before the expiration of the time, specified in the warrant, bond or undertaking, he must be discharged from custody on bail.

**SEC. 3983 (4355). JAIL FEES.**—No jailer is bound to receive any person committed under a warrant issued under the provisions of this chapter, unless his jail fees for the time specified in such warrant are paid in advance.

**SEC. 3984 (4356). FORFEITURE OF BAIL.**—If the fugitive is discharged on bail, and fails to appear or surrender himself, according to his bond or undertaking, the magistrate must indorse thereon "forfeited," sign his name thereto, and return it to the clerk of the Circuit Court by the first day of the next term; and a conditional judgment must be rendered thereon, and proceedings had, as in case of bonds or undertakings forfeited in the courts, the indorsement of the magistrate being presumptive evidence of the forfeiture.

**SEC. 3985 (4357). PROCEEDINGS ON EXPIRATION OF TIME.**—At the expiration of the time specified in the warrant, the magistrate may discharge or recommit him to a further day, or may take bail for his appearance and surrender, as provided in section 3981 (4353); and on his appearance, or if he has been bailed and appear according to the terms of his bond or undertaking, the magistrate may either discharge him therefor, or may require him to enter into a new bond or undertaking, to appear and surrender himself at another day.

**SEC. 3986 (4358). WHEN THE SURRENDER IS DISCRETIONARY.** If a criminal prosecution has been instituted against such person under the laws of this State the Governor may or not, at his discretion, surrender such person on the demand of the executive of another State, before he has been tried and punished, if convicted, or discharged.

**SEC. 3987 (4359). THE GOVERNOR'S WARRANT.** A warrant from the executive may be directed to the sheriff, coroner, or any other person whom he may think fit to entrust with the execution of the same.

**SEC. 3988 (4360). EXECUTION OF THE WARRANT.** Such warrant authorizes the officer or person to whom it is directed to arrest the fugitive at any place within the State, and to require the aid of all sheriffs and constables to whom the same is shown, to aid and assist in the execution thereof.

**SEC. 3989 (4361). AUTHORITY OF ARRESTING OFFICERS.** Every such officer or person has the same authority in arresting the fugitive to command assistance therein, as sheriffs and other officers by law have in the execution of criminal process directed to them, with the like penalties on those who refuse their assistance.

**SEC. 3990 (4362). CONFINEMENT IN JAIL IN TRANSIT.** The officer or person executing such warrant may, when necessary, confine the prisoner ar-

rested by him in the jail of any county through which he may pass; and the keeper of such jail must receive and safely keep the prisoner until the person having charge of him is ready to proceed on his route, such person being chargeable with the expenses of keeping.

## II. ARKANSAS.

[From the Revised Statutes of Arkansas, 1874, pages 564-566, chapter 63.]

### I. ARREST UPON REQUISITION.

**SECTION 2965. ISSUE OF THE EXECUTIVE WARRANT.** Whenever the executive of any other State or Territory of the United States shall demand of the executive of this State any person as a fugitive from justice, having complied with the requisitions of the act of Congress in that case made and provided,† it shall be the duty of the executive of this State to issue his warrant, under the seal of the State, directed to any sheriff, coroner, or other person, whom he may think fit to intrust with the execution of such warrant.

**SEC. 2966. AUTHORITY OF THE WARRANT.** Such warrant shall authorize the person to whom it may be directed to arrest the fugitive anywhere within the limits of this State, and to convey him to any place within the State which the executive may in his warrant direct; and commanding all sheriffs, constables, coroners, and other officers, to whom the same may be shown to aid and assist in the execution thereof.

**SEC. 2967. EXECUTION OF THE WARRANT.** Every such warrant may be executed in any part of the State, and the officer or person to whom it is directed shall have the same power to command assistance therein, and in receiving and conveying to the proper place any person duly arrested, as sheriffs and other officers by law have in the execution of civil and criminal process directed to them, with like penalties on those who refuse their assistance.

**SEC. 2968. CONFINEMENT IN JAIL IN TRANSIT.** The officer or person executing such warrant may, when necessary, confine the prisoner arrested by him in the jail of any county through which he may pass in conveying such prisoner to the place commanded in the warrant, and the keeper of such jail shall receive and safely keep such prisoner until the person having him in charge shall be ready to proceed on his route.\*

**SEC. 2969. EXPENSES INCURRED.** The expenses which may accrue under the foregoing provisions of this chapter, being first ascertained by the executive, shall, on his certificate, be allowed and paid out of the State treasury.

† See Const. of the U. S., Art. IV, and Act of Congress passed Feb. 12, 1793, 1 U. S. Stat. 302.

\* It seems that no person so in custody can be discharged on writ of habeas corpus. See Sec. 3130, Rev. Stat. of Arkansas, sub-division fourth.

## II. ARREST PRIOR TO REQUISITION.

SECTION 2970. WARRANT UPON OATH OR AFFIRMATION. Whenever any person within this State shall be charged, on the oath or affirmation of any creditable person, before any judge or justice of the peace of this State, with the commission of any crime in any other State or Territory of the United States, and that such person hath fled from justice, such judge or justice shall issue his warrant for the apprehension of such person.

SEC. 2971. BAIL MAY BE TAKEN. If on examination it shall appear to the judge or justice that the person charged is guilty of the crime as alleged, he shall commit him to the jail of the county, or if the offense is bailable, take bail for his appearance at the next term of the Circuit Court in the county.

SEC. 2972. MODE OF PROCEDURE. The judge or justice shall proceed in the examination of such person in the same manner as is required when a person is brought before such officer charged with an offense against the laws of this State, and shall reduce the examination to writing, and make return thereof, as in other cases; and shall also send a copy of the examination and proceedings to the executive of this State without delay.

SEC. 2973. DELIVERY WITHOUT A COPY OF THE INDICTMENT. If, in the opinion of the executive, the examination contains sufficient evidence to warrant the finding of an indictment, he shall forthwith notify the executive of the State or Territory in which such crime is alleged to have been committed of the proceedings against the person arrested, and that he will be delivered on demand, without requiring a copy of the indictment to accompany the demand.

SEC. 2974. WARRANT TO THE SHERIFF. When a demand shall be made for the offender, the executive shall forthwith issue his warrant, under the seal of the State, to the sheriff of the county wherein the party charged is committed or bailed, commanding him to surrender the accused to such messenger as shall be therein named, to be conveyed out of the State.

SEC. 2975. ACCUSED IF RELEASED ON BAIL TO BE ARRESTED. If the accused shall be at large, on bail or otherwise, the sheriff shall forthwith arrest him, anywhere within the State, and surrender him agreeably to the command of the warrant.

SEC. 2976. DISCHARGE OF THE RECOGNIZANCE. In all cases where the party shall have been admitted to bail, and shall appear according to the condition of his recognizance, and he shall not have been demanded, the Circuit Court may discharge the recognizance, or continue it, according to the circumstances of the case, such as the distance of the place where the offense is alleged to have been committed, the time since the arrest, the nature of the evidence, and the like.

SEC. 2977. RIGHT TO THE DISCHARGE. In no case shall the accused be kept in prison, or held to bail, beyond the end of the second term of the Circuit Court after the arrest, if no demand shall be made for him within that time, but shall be discharged.

**SEC. 2978. FORFEITURES TO INURE TO THE STATE.** If any recognizance entered into under the provisions of this chapter shall be forfeited, it shall inure to the benefit of the State. [Rev. Stats., chap. 67.]

**SEC. 2979. FUGITIVES FLEEING FROM ARKANSAS—DUTY OF THE GOVERNOR.** Whenever the Governor of this State shall demand any fugitive from justice from the executive of another State or Territory, and shall have received notice that such fugitive will be surrendered, he shall issue his warrant, under the seal of the State, to some messenger, commanding him to receive and convey such fugitive to the sheriff of the county in which the offense was committed, or is by law cognizable.

**SEC. 2980. EXPENSES, HOW PAID.** The expenses which may accrue under the provisions of the preceding section, being ascertained to the satisfaction of the Governor, shall, on his certificate, be allowed and paid out of the treasury as other demands against the State. [Rev. Stats. chap. 45, §§ 240, 241.]

### III. CALIFORNIA.

[From the Codes and Statutes of California, 1876, by Theodore H. Hittell, Vol. 1, page 117, bottom paging; Vol. 2, pages 1385, 1386, bottom paging.]

**SECTION 880. DUTY OF GOVERNOR.** In addition to those prescribed by the Constitution the Governor has the power and must perform the duties prescribed in this and the following sections:

\* \* \* \* \*

8. He may offer rewards not exceeding one thousand dollars each, payable out of the general fund, for the apprehension of any convict who has escaped from the State prison, or of any person who has committed or is charged with the commission of an offense punishable with death.

9. He must perform such duties respecting fugitives from justice, as are prescribed by chapter IV, of title XII of the Penal Code.\* [Political Code, part III, chapter III, article III, section 880.]

#### CHAPTER IV OF TITLE XII OF THE PENAL CODE.

14,548. **SECTION 1548. FUGITIVES FROM OTHER STATES.** A person charged in any State of the United States with treason, felony, or other crime, who flees from justice and is found in this State must on demand of the executive authority of the State from which he fled, be delivered up by the Governor of this State, to be removed to the State having jurisdiction of the crime.

14,549. **SEC. 1549. MAGISTRATE TO ISSUE WARRANT.** A magistrate may issue a warrant for the apprehension of a person so charged, who flees from justice and is found in this State.

\*Chapter IV of Title XII of the Penal Code embraces sections or paragraphs 14547 to 14556, both inclusive, in Mr. Hittell's edition of the Codes, vol. 2, pp. 1385, 1386, bottom paging, and sections 1547 to 1558 of the Penal Code, both inclusive. Both the paragraphs of Mr. Hittell and of the Code are given.

14,550. SEC. 1550. PROCEEDINGS FOR ARREST AND COMMITMENT. The proceedings for the arrest and commitment of a person charged are, in all respects, similar to those provided in this Code for the arrest and commitment of a person charged with a public offense committed in this State, except that an exemplified copy of an indictment found or other judicial proceedings had against him in the State in which he is charged to have committed the offense, may be received as evidence before the magistrate.

14,551. SEC. 1551. COMMITMENT TO JAIL. If, from the examination, it appear that the accused has committed the crime alleged, the magistrate by warrant reciting the accusation, must commit him to the proper custody in his county, for such time, to be specified in the warrant, as the magistrate may deem reasonable, to enable the arrest of the fugitive under the warrant of the executive of this State, on the requisition of the executive authority of the State in which he committed the offense, unless he gives bail as provided in the next section, or until he is legally discharged.

14,552. SEC. 1552. ADMISSION TO BAIL. The magistrate may admit the person arrested to bail by an undertaking with sufficient securities, and in such sums as he deems proper, for his appearance before him at a time specified in the undertaking, and for his surrender to arrest upon the warrant of the Governor of this State.

14,553. SEC. 1553. NOTICE TO DISTRICT ATTORNEY OF ARREST. Immediately upon the arrest of the person charged, the magistrate must give notice thereof to the district attorney of the county.

14,554. SEC. 1554. DUTY OF DISTRICT ATTORNEY. The district attorney must immediately thereafter give notice to the executive authority of the State, or to the prosecuting attorney or presiding judge of the court of the city or county within the State having jurisdiction of the offense, to the end that a demand may be made for the arrest and surrender of the person charged.

14,555. SEC. 1555. DISCHARGE OF PERSONS ARRESTED. The person arrested must be discharged from custody or bail, unless, before the expiration of the time designated in the warrant or undertaking, he is arrested under the warrant of the Governor of this State.

14,556. SEC. 1556. RETURN OF THE PROCEEDINGS. The magistrate must return his proceedings to the superior court of the county, which must thereupon inquire into the cause of the arrest and detention of the person charged, and if he is in custody, or the time of his arrest has not elapsed, it may discharge him from detention or may order his undertaking of bail to be canceled, or may continue his detention for a longer time, or readmit him to bail to appear and surrender himself within a time specified in the undertaking. [As amended by act approved April 12, 1880, which took effect immediately.]

14,557. SEC. 1557. FUGITIVES FROM CALIFORNIA—Costs. When the Governor of this State, in the exercise of the authority conferred by section 2, article IV of the Constitution of the United States, or by the laws of this State, demands from the executive authority of any State of the United

States, or of any foreign government, the surrender to the authorities of this State of a fugitive from justice, who has been found and arrested in such State or foreign government, the accounts of the person employed by him to bring back such fugitive must be audited by the board of examiners, and paid out of the State treasury.

14,558. SEC. 1558. NO FEE OR REWARD TO PUBLIC OFFICER, ETC. No compensation, fee or reward of any kind can be paid to or received by a public officer of this State, or other person, for a service rendered in procuring from the Governor the demand mentioned in the last section, or the surrender of the fugitive, or for conveying him to this State, or detaining him therein, except as provided for in such section.

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#### IV. COLORADO.

[From General Statutes of Colorado, 1888, pages 511-518 ; chap. 44.]

SECTION 1. REQUISITION—WARRANT BY GOVERNOR.—Whenever the executive of any other State or of any Territory of the United States, shall demand of the executive of this State any person as a fugitive from justice, and shall have complied with the requisitions of the act of Congress in that case made and provided, it shall be the duty of the executive of this State to issue his warrant under the seal of the State to apprehend the said fugitive directed to any sheriff, coroner or constable of any county of the State, or other persons whom the said executive may think fit to intrust with the execution of said process. Any of the said persons may execute such warrant anywhere within the limits of this State, and convey such fugitive to any place within this State which the executive in his warrant shall direct. [Section 1274, p. 480, G. L. ; section 1, p. 341, R. S.]

SEC. 2. DEMAND OF FUGITIVE FROM THIS STATE.—Whenever the executive of this State shall demand a fugitive from justice from the executive of any other State or Territory, he shall issue his warrant under the seal of the State, to some messenger, commanding him to receive the said fugitive and convey him to the sheriff of the proper county where the offense was committed.\* [Section 1275 (2), p. 480, G. L. ; section 2, p. 341, R. S.]

SEC. 3. EXPENSES.—The expenses which may accrue under the last preceding sections, being first ascertained to the satisfaction of the executive, shall on his certificate be allowed and paid out of the State treasury on the warrant of the auditor. [Section 1276 (3), p. 480, G. L. ; section 3, pp. 341-2, R. S.]

SEC. 4. ARREST OF CRIMINALS FROM OTHER STATES.—Whenever any person within this State shall be charged, upon the oath or affirmation of any credible witness, before any judge or justice of the peace, with the commission of any murder, rape, robbery, burglary, arson, larceny, forgery,

\* Limitation on prosecutions for crimes does not extend to fugitives, sec. 287, ch. 33, Crim. Code.

or counterfeiting, in any other State or Territory of the United States, and that the said person had fled from justice, it shall be lawful for the said judge or justice to issue his warrant for the apprehension of said person.

If, upon examination, it shall appear to the satisfaction of such judge or justice that the said person is guilty of the offense alleged against him, it shall be the duty of the judge or justice to commit him to the jail of the said county, or if the offense is bailable according to the laws of this State, to take bail for his appearance at the next district court to be holden in that county.

It shall be the duty of the said judge or justice to reduce the examination of the prisoner, and those who bring him, to writing, and to return the same to the next district court of the county where such examination is had, as in other cases, and shall also send a copy of the examination and proceedings to the executive of this State, so soon thereafter as may be. If, in the opinion of the executive of this State, the examination so furnished contains sufficient evidence to warrant the finding of an indictment against such person, he shall forthwith notify the executive of the State or Territory where the crime is alleged to have been committed, of the proceedings which have been had against such person, and that he will deliver such person on demand without requiring a copy of an indictment to accompany such demand. When such demand shall be made, the executive of this State shall forthwith issue his warrant under the seal of the State, to the sheriff of the county where the said person is committed or bailed, commanding him to surrender him to such messenger as shall be therein named, to be conveyed out of this State. If the said person shall be out on bail, it shall be lawful for the sheriff to arrest him forthwith, anywhere within the State, and to surrender him agreeably to said warrant. [Section 1277 (4), pp. 480-1, G. L.; section 4, p. 842, R. S.]

**SEC. 5. APPEARANCE OF PARTY BAILED — DISCHARGE.** In cases where a party shall have been admitted to bail, and shall appear at the district court according to the condition of his recognizance, and no demand shall have been made of him, it shall be in the power of said court to discharge the said recognizance, or continue it according to the circumstances of the case, such as the distance of the place where the offense is alleged to have been committed, the time that hath intervened since the arrest of the party, and the strength of the evidence against him. If no demand be made upon the sheriff for him within that time, he shall be discharged from prison or exonerated from his recognizance, as the case may be. [Sec. 1278 (5), p. 481, G. L.; section 5, pp. 842-3, R. S.]

**SEC. 6. FORFEITURE OF RECOGNIZANCE.** If the recognizance shall be forfeited, it shall inure to the benefit of the State. [Sec. 1279 (6), p. 482, G. L.; section 6, p. 843, R. S.]

**SEC. 7. SECURITY FOR COSTS — EXECUTION — FEES, ETC.** In all cases where complaint shall be made, as aforesaid, against any fugitive from justice, it shall be the duty of the judge or justice to take good and sufficient



security for the payment of all costs which may accrue from the arrest and detention of such fugitive, which security shall be by bond to the clerk of the district court, conditioned for the payment of costs, as above, which bond, together with a statement of the costs which may have accrued on the examination, shall be returned to the office of the clerk of the district court, and upon the determination of the proceedings against such fugitive within that county, the clerk shall issue a fee bill as in other cases, to be served on the persons named in the bond, or any of them, which fee bill shall be served and returned by the sheriff, for which he shall be allowed the same fees as are given him for serving notices. If the fees be not paid on or before the first day of the next district court to be holden in and for that county, nor any cause then shown why they should not be paid, the clerk may issue an execution for the same against those parties on whom the fee bill has been served, and when the said fees are collected shall pay over the same to the persons respectively entitled thereto. The clerk shall be entitled to one dollar for his trouble in each case, besides the usual taxed fees which are allowed in other cases for like services. Nothing herein contained shall prevent the clerk from instituting suits on said bonds in the ordinary mode of judicial proceedings, if he shall deem it proper. [Sec. 1280 (7),, p. 482, G. L.; section 7, p. 343, R. S.]

**SEC. 8. ESCAPE — REWARD — CERTIFICATE — AUDITOR'S WARRANT.** If any person charged with or convicted of treason, murder, rape, robbery, burglary, arson, larceny, forgery or counterfeiting, shall break prison, escape or flee from justice, or abscond and secrete himself, in such cases it shall be lawful for the Governor, if he shall judge it necessary, to offer any reward not exceeding two hundred dollars for apprehending and delivering such person into custody of such sheriff or other officer, as he may direct. The person or persons so apprehending and delivering any such person as aforesaid and producing to the Governor, the sheriff or justice's receipt for the body, it shall be lawful for the Governor to certify the amount of such claim to the auditor, who shall issue his warrant on the treasury for the same. [Sec. 1281 (8), pp. 482-3, G. L.; section 8, p. 343, R. S.]

**SEC. 9. (1. APPROPRIATION FOR REWARDS.** That there be, and hereby is, appropriated out of any money in the State treasury not otherwise appropriated, the sum of two thousand dollars, or so much thereof as shall be necessary for the purpose of paying rewards offered by the Governor of the State, for the apprehension of persons charged with the crime of murder. [Section 1, p. 207, acts 1881.]

**SEC. 10. (2.) SHERIFF'S CERTIFICATE OF ARREST, INDORSED BY GOVERNOR.** That whenever the Governor, by his proclamation shall offer a reward for the apprehension of any such person or persons mentioned in the first section of this act,\* the person making such arrest shall deliver

\*The first section here referred to is Section 9 of this chapter, being the next preceding section, which is also Section 1 of acts of 1881, approved and in force February 12, 1881.

the person or persons so arrested to the sheriff of the county where such crime was committed; the said sheriff shall give to the person making such arrest and delivery a certificate that he has delivered to the said sheriff the person or persons named in the proclamation of the Governor. The Governor shall indorse on said certificate his approval of the same and the amount of the reward so offered in his proclamation. On presentation to the auditor of State [of] such certificate, so indorsed by the Governor, he shall draw his warrant on the State treasurer for the amount so certified. [Section 2, p. 207, acts 1881; approved and in force February 12, 1881.]

#### V. CONNECTICUT.

[From the General Statutes of Connecticut, Revision of 1875. Chap. 13, title 20, part viii, page 544, together with the act of February 28, 1877.]

**SECTION 1. APPOINTMENT OF AN AGENT TO RECEIVE THE FUGITIVE.** The Governor may appoint agents to demand and receive, from the executive authority of another State, any fugitive from justice, or person charged with any high crime in this State; and any application to the Governor for that purpose shall be sustained by a properly attested copy of the record of the proceedings against the accused person, with affidavits of one or more of the principal witnesses.

**SEC. 2. INVESTIGATION OF APPLICATION.** Any prosecuting officer, when required by the Governor, shall forthwith investigate the grounds of such application, and report to him all the material circumstances which may come to his knowledge, and his opinion as to the expediency of the demand.

**SEC. 3. WHEN GOVERNOR TO ISSUE WARRANT.** When a demand shall be made upon the Governor, by the executive authority of another State for the surrender of any person, charged in such State with any high crime, any prosecuting officer, when required by the Governor, shall forthwith investigate the ground of such demand, and report to him the situation and circumstances of the person so demanded, and whether he ought to be surrendered; and if the Governor shall find that such demand is conformable to law and ought to be complied with, he shall issue his warrant, directed to any proper officer, requiring the arrest of such person and his delivery to the agent appointed to receive him.

**SEC. 4. CONVEYANCE THROUGH CONNECTICUT OF FUGITIVE APPREHENDED.** When an offender shall be apprehended in any neighboring State, and it may be necessary to convey him through this State to the place where the offense was committed, any justice of the peace, upon application made and proof that lawful process has issued against such offender, shall issue a warrant, directed to any proper officer, or any person by name, who shall be sworn to the faithful performance of his duty, commanding him to cause such offender to be conveyed to the line of this

State, nearest to the State where the offense was committed, there to be delivered to some proper officer ready to receive him; and the person to whom such warrant is directed shall obey it upon tender of the lawful fees therefor.

ACT OF FEBRUARY 28, 1877.

[Laws of 1877, chap. 37.]

**SECTION 1. WHEN FUGITIVE MAY BE ARRESTED.** When any person is found in this State charged with an offense committed in another State or Territory, and liable by the Constitution and laws of the United States to be delivered over upon the demand of the executive of such other State or Territory, any judge of the superior court, upon the information of the State attorney of the county where such information is made, and any city or police court having criminal jurisdiction, upon the complaint of the proper prosecuting officer of such court, may issue a warrant to arrest the person charged and bring him before the authority issuing such warrant, or some other authority empowered by this act to issue the same, to answer such information or complaint as in other criminal cases; but before such warrant shall be issued some person shall make affidavit before the authority issuing the same to the facts necessary to bring the case within the provisions of this law.

**SEC. 2. BOND FOR FUTURE APPEARANCE.** If, upon the hearing on such information or complaint, the judge or court shall be satisfied upon due inquiry that the person arrested is a fugitive from justice, and that the proper authorities of such other State or Territory intend and are about to make a demand upon the executive of this State for the return of such person, he shall be required, if charged with an offense bailable in the State or Territory where committed, to recognize in a reasonable sum with sufficient sureties to appear before such judge or court at a future day, and to abide the order of such court or judge; and in appointing the day for the appearance of such person a reasonable time shall be allowed in which to procure the warrant of the executive of this State for the arrest of such person.

**SEC. 3. COMMITMENT TO JAIL.** If such person does not so recognize, or if the offense with which he is charged is not bailable in the State or Territory where committed, he shall be committed to the county jail in the county where such proceedings are had, and there detained until the day appointed for his appearance, in like manner as if the offense charged had been committed within this State.

**SEC. 4. DISCHARGE.** If the person so recognized or committed appear before such judge or court upon the day ordered he shall be discharged unless he is demanded by some person authorized by the warrant of the executive of this State to receive him, or unless such judge or court shall find cause to order his appearance at some future day, when he may be required to recognize or be committed and detained as before.

**SEC. 5. RECOGNIZANCES.** All recognizances taken under this act shall be

taken to the State, and if the person recognizing fails to appear according to the condition of his recognizance, the same shall be forfeited, and like proceedings shall be had as in case of other recognizances taken in criminal cases: *Provided*, that, if the person charged recognizes, or is committed, any person authorized by the warrant of the executive of this State, may at all times take him into custody, and the same shall be a discharge of the recognizance, and not be deemed an escape.

SEC. 6. NOTICE TO STATE ATTORNEY, AND HIS DUTY. The judge or court before whom such person shall have been examined and recognized or committed shall immediately cause written notice to be given to the State attorney of the county where the examination takes place, if the proceedings are not had upon the information of such attorney, of the name of such person and of the cause of his arrest, and the State attorney, in all cases, shall immediately cause like notice to be given to the Governor of the State or Territory, or to the State attorney, or to the judge of the criminal court of the city or county of the State or Territory in which the offense is charged to have been committed.

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## VI. DELAWARE.

[From the Revised Statutes of Delaware, Revised Code of 1852, as amended, etc., to 1874, pages 769-770 and act of March 9, 1888, Laws, ch. 223.]

SECTION 1. ARREST WITHOUT LEGAL PROCESS DECLARED FELONY. That if any person or persons shall, within the limits of this State, arrest or cause, procure or aid in the arrest of any white citizen of this State, or of any white non-resident, being at the time within the limits of this State, unless such arrest shall be made upon legal process issued for that purpose by a judge, justice of the peace or some other officer duly authorized to issue process in criminal or civil proceedings by the laws of this State or of the United States, or unless such arrest be made to prevent a breach of the peace or the commission of some crime against the laws of this State or of the United States (and in all cases where arrests shall be made to prevent a breach of the peace or of the commission of some crime against the laws of this State or of the United States), the person or persons so arrested shall be, forthwith and without any intermediate incarceration, taken before a judge, justice of the peace or other officer duly authorized to issue process in criminal cases, to be dealt with according to the course of the common law or of the statute in such case made and provided, and shall be released from imprisonment or arrest, unless then and there duly charged on oath or affirmation, and if so charged shall be bailed if the case be bailable, or otherwise dealt with according to the course of the common law or of the statute in such case made and provided, or unless the person arrested belongs to the land or naval service of the United States or to the militia in actual service, such person or persons so offending shall be guilty of

felony, and upon conviction thereof shall forfeit and pay a fine of not less than five hundred nor more than two thousand dollars and shall be imprisoned not less than six months nor more than two years. [Act of February 24, 1863, § 1.]

**SEC. 2. UNLAWFUL ABDUCTION FROM THE STATE.** That if any person shall abduct, take or carry from the limits of this State any white citizen of this State, or any white non-resident being at the time within the limits of this State, or shall cause, procure, assist or aid the abduction, taking or carrying from the limits of this State, any such citizen or non-resident, unless such person so abducted, taken or carried without the limits of the State shall be duly delivered up upon the requisition or demand of the executive authority of some other State in conformity with the provisions of the Constitution of the United States in that behalf, or unless such person so abducted, taken or carried away shall belong to the land or naval service of the United States, or to the militia when in actual service, such person or persons so offending shall be guilty of felony, and upon conviction thereof shall forfeit and pay a fine of not less than five hundred dollars nor more than two thousand dollars and shall be imprisoned not less than six months nor more than two years. [Act of February 24, 1863, § 2.]

**SEC. 3. AFFIDAVITS FOR ARREST MADE BEFORE PROPER OFFICER.** That if any person or persons shall make, procure or cause to be made any affidavit or statement under oath or affirmation, for the purpose or with the intent of procuring or causing the arrest of any white citizen of this State, or any white non-resident being at the time within the limits of this State before any person or persons not authorized by the laws of this State or of the United States, to take such affidavit or deposition or statement under oath or affirmation with the intent of procuring or causing the arrest of any white citizen of this State, or of any white non-resident as aforesaid, by any person acting under the military authority of any other State or of the United States, and not acting by virtue of legal process, or shall make such affidavit with the intent of procuring or causing the abduction, removal, taking or carrying out of the limits of this State any white citizen of this State, or any white non-resident as aforesaid, contrary to the laws of this State or of the United States, such person so offending shall be guilty of felony, and upon conviction thereof shall forfeit and pay a fine of not less than five hundred dollars, nor more than two thousand dollars, and shall be imprisoned not less than six months nor more than two years. [Act of February 24, 1863, § 3.]

**SEC. 4. HOW OFFENSES SUBMITTED TO GRAND JURY.** That the judges presiding at the April Term of the Court of General Session of the Peace and Jail Delivery in Sussex and Kent counties, and at the May Term of said court in New Castle county shall give sections 1, 2 and 3 of this act specially in charge to the grand juries in the respective counties. [Act of February 24, 1863.]

## ACT OF MARCH 9, 1888.

[Laws 1888, chapter 223.]

**SECTION 1. POWER OF THE GOVERNOR AS TO FUGITIVES.** The Governor, in any case authorized by the Constitution of the United States, may, on demand, deliver over to the executive authority of any other State or Territory any person charged therein with treason, felony, or other crime committed therein; and he may, on application, appoint an agent to demand of the executive authority of any other State or Territory any person charged with felony who has fled from the justice of this State; but such demand or application must be accompanied by sworn evidence that the party charged is a fugitive from justice, and that the demand or application is made in good faith for the punishment of crime and not for the purpose of collecting a debt or pecuniary mulct, or of removing the alleged fugitive to a foreign jurisdiction with a view there to serve him with civil process, and also by a duly attested copy of an indictment or an information, or a duly attested copy of a complaint made before a court or magistrate authorized to take the same; such complaint to be accompanied by an affidavit or affidavits to the facts constituting the offense charged by persons having actual knowledge thereof, and such further evidence in support thereof as the Governor may require. Fugitive convicts shall also be surrendered and demanded upon the record of their conviction, or sworn evidence, duly authenticated, satisfactory to the Governor.

**SEC. 2. INVESTIGATION BY ATTORNEY-GENERAL.** Where such demand or application is made, the Attorney-General shall, if the Governor requires it, forthwith investigate the grounds thereof and report to the Governor all the material facts which may come to his knowledge, and especially in the case of a person demanded, whether he is held in custody or is under recognizance to answer for any offense against the laws of this State, or by force of any civil process, with an opinion as to the legality and necessity of complying with the demand or application.

**SEC. 3. PROCEEDING FOR DELIVERY.** If, in case of demand for the surrender of a person charged with an offense committed in another State or Territory, the Governor decides that it is proper to comply with the demand, he shall issue a warrant to the sheriff of the county in which such person so charged may be found, commanding him forthwith to arrest and bring such person before the chief justice, or any judge of the Superior Court, to be examined on the charge; and upon the return of the warrant by the sheriff with the person so charged in custody, the judge before whom the person so arrested is brought, and to whom the warrant is returned, shall proceed to hear and examine such charge, and upon proof made in such examination by him adjudged sufficient, shall commit such person to the jail of the county in which such examination is so had for a reasonable time, to be fixed by the judge in the order of commitment, and thereupon shall cause notice to be given to the executive authority making such de-

mand, or to the duly authorized agent of such executive authority appointed to receive the fugitive, and on payment of all costs by such agent such fugitive shall be delivered to him, to be thence removed to the proper place for prosecution, and if such agent does not appear within the time so fixed and pay the costs as aforesaid, the sheriff shall discharge the person so imprisoned. Whenever the Attorney-General shall have been called on in such case for any service under this act, a reasonable charge for his services may be taxed by the judge as a part of the costs to be paid as aforesaid, and in default thereof to be paid by the State treasurer upon a draft drawn on him for the same. Bail shall be taken for the appearance of the accused by the judge before whom he is brought in pursuance of the provisions of this section, as in other cases.

**SEC. 4. AFFIDAVIT CHARGING CRIME.** When an affidavit is filed before the chief justice or any judge of the Superior Court, or a justice of the peace, setting forth that a person charged with the commission of an offense against the laws of any other State or of any of the Territories of the United States, and which if the act had been committed in this State would, by the laws thereof, have been a crime, is, at the time of filing such affidavit, within the county where the same is filed, such judge or justice of the peace shall issue his warrant, directed to the sheriff or any constable of the county, commanding him forthwith to arrest and bring before him the person so charged.

**SEC. 5. DUTY OF EXAMINING OFFICER.** When a person is arrested in pursuance of the preceding section and brought before the officer who issued the warrant, the officer shall hear and examine such charge, and upon proof by him adjudged to be sufficient, commit such person to the jail of the county in which such examination is had.

**SEC. 6. NOTICE OF COMMITMENT.** When a person is committed to jail by a judge or justice of the peace under the preceding section, such judge or justice of the peace shall forthwith give, or cause to be given notice, by letter or otherwise, to the sheriff of the county in which such offense was committed, or to the person injured by such offense, or to the person upon whose affidavit the arrest was made; and no person so committed shall be detained longer in jail than is necessary to allow a reasonable time to the persons so notified, after they receive such notice, to apply for and obtain the proper requisition for the person so committed. In all cases arising under this and the two preceding sections, bail shall be taken as in other cases.

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## VII. FLORIDA.

[From McClellan's Digest of the Laws of Florida, 1881, chap. 84, §§ 7-10, pp. 487, 488.]

**SECTION 7. WARRANT TO ISSUE ON DEMAND.** It shall be the duty of the Governor of this State, when demand shall be made of him by the executive of any State or Territory, of any fugitive from justice, in the manner prescribed by the act of Congress, approved 12th of February, 1793, to

cause said fugitive to be arrested and secured, either by making public proclamation or by issuing an order to that effect, as he may deem most expedient, under his hand and the seal of the State, directed to all and singular the sheriffs of this State, therein commanding them to arrest the fugitive therein named ; and it shall be the duty of any sheriff, upon receiving such order, forthwith to execute the same. [Act of February 9, 1835, § 1.]

**SEC. 8. FUGITIVE TO BE COMMITTED TO PRISON, ETC.** When any fugitive shall be arrested, he or she shall be immediately committed to some jail or prison ; and it shall be the duty of the sheriff or deputy sheriff, upon such arrest being made, to notify the Governor thereof, and also of the jail or prison to which said fugitive shall be committed; and said fugitive shall be dwelt [dealt] with as by said act of Congress is provided. [Act of February 9, 1835, § 2.]

**SEC. 9. FUGITIVE TO BE EXAMINED BEFORE PROPER OFFICER AND HELD OR DISCHARGED.** Upon an affidavit made before any judge or justice of the peace of this State, that any person within the territorial jurisdiction of such judge or justice is a fugitive from justice from another State, specifying the State from which such person is a fugitive, and the crime with which he is charged, when and where committed, and that there is a warrant for his arrest issued by a competent court of the State from which he has fled, such judge or justice of the peace may issue a warrant for the arrest of the alleged fugitive, who, when arrested, shall be brought at once before the judge or justice issuing the warrant, or before some other judge or justice having jurisdiction in the premises, and examined; and if, upon such examination, there is found to be probable cause to justify the detention of the alleged fugitive, he may be committed by the judge or justice for a period of time not to exceed ten days, to await the warrant for the extradition of the alleged fugitive; but if, upon such examination, there is not found probable cause to justify the commitment of the alleged fugitive as aforesaid, he shall be at once discharged from custody. [Act of February 17, 1881, chap. 3257, § 1.]

**SEC. 10. COSTS, BY WHOM PAID.** No judge, justice of the peace, sheriff, constable or other officer shall be obliged to take any action in or about the arrest and detention of such alleged fugitive from justice, nor shall any sheriff or jailer be obliged to receive or keep in custody any such alleged fugitive without pre-payment of the costs to which the officer of whom the service is demanded shall be entitled, and in case of the sheriff or jailer, upon the commitment of such alleged fugitive from justice, the prepayment of the jail fees, including the cost of feeding the prisoner, and all such fees and costs shall be the same as are or may be provided for by law in like cases, and neither the State of Florida nor any county thereof shall be responsible or liable for any costs or expenses in the premises. [Act of February 17, 1881, chap. 3257, § 2.]

[In capital cases the Governor of Florida is authorized to offer a reward for fugitives not exceeding \$200. The statute is as follows :]



**SEC. 31. REWARD MAY BE OFFERED FOR FUGITIVES.** The Governor of this State shall be authorized to offer a reward, not exceeding two hundred dollars, for the apprehension of absconding felons in capital cases; and the Governor shall be authorized to draw upon the Treasurer of the State for the above sum, when necessary, to be paid for the reward so offered. [Act of November 19, 1893, § 22; McClellan's Digest of Laws of Florida, chap. 110, § 31, p. 557.]

#### VIII. GEORGIA.

[From the Code of Georgia, edition of 1882, Lester, Rowell and Hill, Part I, title III, chap. I, §§ 53-58, pages 20-21.]

**SECTION 53. (56) (60.) ARREST OF FOREIGN FUGITIVE.** Whenever there is found within this State a fugitive from justice from a foreign State, and by the treaty stipulations of the United States such person is to be surrendered up to the authorities of a foreign State upon requisition from proper officers, the Governor, by his warrant, shall cause him to be arrested and delivered over to such officer.

**SEC. 54. (57) (61.) ARREST OF FUGITIVE FROM ANOTHER STATE.** It is the duty of the Governor, under his warrant, to cause to be arrested and delivered up to the proper officer of any other State of the United States, any fugitive from justice from said State, upon demand made of him by the executive of such other State in the manner prescribed by the laws and Constitution of the United States. And if such fugitive shall have assumed another name in the State and the Governor is satisfied, by evidence on oath filed in his office, of the identity of such person with the fugitive demanded, he shall state the fact in his warrant for the arrest.

**SEC. 55. (58) (62.) POSTPONEMENT OF DELIVERY.** If any person demanded as a fugitive from justice is, at the time of such demand, under prosecution for an offense against the laws of this State, the Governor shall suspend his delivery until the issue is determined as to his guilt, and if condemned, until he shall have suffered the penalty of the law imposed.

**SEC. 56. (59) (63.) FUGITIVES NOT DEMANDED.** When a person charged with the commission of an offense in some other State shall flee into this, and is pursued and caught, or some person in the State, finding shall arrest him, it is the duty of the Governor, on oath filed in his office of the commission of the offense, and the identity and locality of the party, to issue his warrant for his arrest, as in other cases, and command his lodgment in any jail in the State, for as long as twenty days, and if, at their expiration, there is no formal demand made by the Governor of the State where the offense is alleged to be committed, he shall be discharged from custody; but upon affidavit, made before any proper officer, of the commission of the offense, and of such intended application, the accused shall be held under it five days.

**SEC. 57. (60) (64.) EXECUTION OF WARRANTS.** When the Governor or other officer issues such or any other warrant of arrest, it is the duty of the

sheriffs, deputies, coroners and constables to execute them when placed in their hands.

**SEC. 58. (61) (65.) GOVERNOR MAY OFFER REWARDS.** The Governor shall, in his discretion, offer, and cause to be paid, rewards for the detection or apprehension of the perpetrator of any felony committed within this State; [such reward shall not exceed the sum of two hundred and fifty dollars in cases of felonies not capital, and not to exceed the sum of five hundred dollars in capital felonies]; but no such rewards shall be paid to any officer who shall arrest such person in the regular discharge of his duty, by virtue of process in his hands to be executed, nor to any person who has arrested the offender previous to the publication of the reward; and whenever he receives reliable information that any gin-house in this State has been unlawfully burned, or set on fire, shall offer a reward of not less than two hundred and fifty dollars, nor more than five hundred dollars, for the apprehension of the incendiary or incendiaries with proof sufficient to convict, and in no event shall said reward be paid until after the conviction of such offender or offenders.

#### IX. ILLINOIS.

[From the Revised Statutes of Illinois, 1880, Hurd; pages 561-563, chap. 60, §§ 1-17.]

**SECTION 1. WARRANT FOR ARREST ON REQUISITION.** Whenever the executive of any other State, or of any Territory of the United States, shall demand of the executive of this State any person as a fugitive from justice and shall have complied with the requisitions of the act of Congress in that case made and provided, it shall be the duty of the executive of this State to issue his warrant under the seal of the State, to apprehend the said fugitive, directed to any sheriff, coroner, or constable of any county of this State, or other person whom the said executive may think fit to intrust with the execution of said process. [See p. 86, R. S. 1845, p. 261, § 1.]

**SEC. 2. ARREST; DELIVERY.** Any such officer or person may, at the expense of the agent making the demand, execute such warrant anywhere within the limits of this State, and require aid as in criminal cases, and may convey such fugitive to any place within this State which the executive in his said warrant shall direct, and deliver such fugitive to such agent. [R. S. 1845, p. 261, § 1.]

**SEC. 3. ARREST OF ACCUSED BEFORE REQUISITION.** When a person is found in this State, charged with an offense committed in another State or Territory, and liable by the Constitution and laws of the United States, to be delivered over upon the demand of the executive of such other State or Territory, any judge, justice of the peace or police magistrate may, upon complaint under oath, setting forth the offense, and such other matters as are necessary to bring the case within the provisions of the law, issue a warrant to bring the person charged before the same or some other judge, justice of the peace or police magistrate within this State, to answer to such complaint as in other cases. [R. S. 1845, p. 262, § 4.]

**SEC. 4. COMMIT OR BAIL.** If, upon examination, it shall appear to the satisfaction of such judge, justice or police magistrate, that the person is guilty of the offense alleged against him, it shall be the duty of the said judge, justice or police magistrate to commit him to the jail of the county; or if the offense is bailable according to the laws of this State, to take bail for his appearance at the next Circuit Court to be holden in that county, except that in the county of Cook the recognizance shall be for the appearance of the accused to the next term of the Criminal Court of Cook county.

**EXAMINATION REDUCED TO WRITING; COPY TO COURT AND GOVERNOR.** It shall be the duty of the said judge, justice or police magistrate to reduce the examination of the prisoner, and those who bring him, to writing, and to return the same to the next term of the court at which the prisoner is bound to appear, as in other cases; and [he] shall also send a copy of the examination and proceedings to the executive of this State as soon thereafter as may be.

**NOTICE TO THE EXECUTIVE OF OTHER STATE.** If, in the opinion of the executive of this State, the examination so furnished contains sufficient evidence to warrant the finding of an indictment against such person, he shall forthwith notify the executive of the State or Territory where the crime is alleged to have been committed, of the proceedings which have been had against such person, and that he will deliver such person on demand, without requiring a copy of an indictment to accompany such demand.

**WARRANT; SURRENDER; COSTS.** When such demand shall be made the executive of this State shall forthwith issue his warrant, under the seal of the State, to the sheriff of the county where the said person is committed or bailed, commanding him, upon the payment of the expense of such proceeding, to surrender him to such agent as shall be therein named, to be conveyed out of this State. If the said person shall be out on bail, it shall be lawful for the sheriff to arrest him forthwith, anywhere within the State, and to surrender him agreeably to said warrant. [R. S. 1845, p. 262, § 4.]

**SEC. 5. WHEN PRISONER MAY BE DISCHARGED.** If the accused shall appear at the court according to the condition of his recognizance, unless he shall have been demanded by some person authorized by the warrant of the executive to receive him, the court may discharge the said recognizance, or continue it, or require a further recognizance, or commit the accused on his failing to recognize as required by the court, according to the circumstances of the case, such as the distance of the place where the offense is alleged to have been committed, the time that has intervened since the arrest and the strength of the evidence against the accused. In no case shall the accused be held in prison or to bail longer than till the end of the second term of the Circuit Court after his caption, except that in the county of Cook he may be held till the end of the third term of the criminal court of Cook county, after his caption. If he is not demanded within that time he shall be discharged from prison, or exonerated from his recognizance, as the case may be. [R. S. 1845, p. 262, § 5.]

**SEC. 6. FORFEITURE OF RECOGNIZANCE.** If the recognizance shall be forfeited it shall inure to the benefit of the State. [R. S. 1845, p. 262, § 6.]

**SEC. 7. BOND FOR COSTS; PROCEEDINGS ON SAME.** In all cases where complaint shall be made as aforesaid against any fugitive from justice, it shall be the duty of the judge, justice, or police magistrate, to take good and sufficient security for the payment of all costs which may accrue from the arrest and detention of such fugitive; which security shall be by bond, to the clerk of the Circuit Court, except that in the county of Cook the bond shall be to the clerk of the criminal court of said county, conditioned for the payment of costs as above; which bond, together with a statement of the costs which may have accrued on the examination, shall be returned to the office of the clerk of the Circuit Court, or criminal court of Cook county, as the case may be; and upon the determination of the proceedings against such fugitive within that county the clerk shall issue a fee bill as in other cases, to be served on the persons named in the bond, or any of them; which fee bill shall be served and returned by the sheriff, for which he shall be allowed the same fees as are given him for serving notices. If the fees be not paid on or before the first day of the next court, nor any cause then shown why they should not be paid, the clerk may issue an execution for the same, against those parties on whom the fee bill has been served; and when the said fees are collected shall pay over the same to the persons respectively entitled thereto. Nothing herein contained shall prevent the clerk from instituting suits on said bonds, in the ordinary mode of judicial proceedings, if he shall deem it proper. [R. S. 1845, p. 262, § 7.]

**SEC. 8. FUGITIVES FROM ILLINOIS.** Whenever the executive of this State shall demand a fugitive from justice from the executive of any other State, he shall issue his warrant, under the seal of the State, to some messenger, commanding him to receive the said fugitive and convey him to the sheriff of the proper county where the offense was committed. [R. S. 1845, p. 261, § 2.]

**SEC. 9. MANNER OF APPLYING FOR REQUISITION.** The manner of making application to the Governor of this State for a requisition for the return of a fugitive from justice shall be by petition, in which shall be stated the name of the fugitive, the crime charged in the words of the statute defining the crime, the county in which the crime is alleged to have been committed, the time as nearly as may be when the fugitive fled, the State or Territory to which he has fled, giving facts and circumstances tending to show the whereabouts of the fugitive at the time of the application. Such petition shall be verified by affidavit, and have indorsed thereon the certificate of the judge of the county court of the county in which the crime is alleged to have been committed, that the ends of justice require the return of such fugitive. Such petition shall be filed by the Governor in the office of the Secretary of State, to remain of record in that office. [L. 1867, p. 119, § 1.]

**SEC. 10. COPY OF INDICTMENT.** When the application is based upon an

indictment found, a copy of the indictment, certified by the clerk under the seal of the court in which the indictment was found, shall be attached to the petition.

SEC. 11. **EXPENSES.** When the punishment of the crime shall be the confinement of the criminal in the penitentiary, the expenses shall be paid out of the State treasury on the certificate of the Governor and warrant of the Auditor; in all other cases they shall be paid out of the county treasury of the county wherein the crime is alleged to have been committed. The expenses shall be the fees paid to the officers of the State on whose Governor the requisition is made, and not exceeding twelve cents per mile for all necessary travel in returning such fugitives. Before such accounts shall be certified by the Governor, or paid by the county, they shall be verified by affidavit and certified to by the judge of the county court of the county wherein the crime is alleged to have been committed. [L. 1867, p. 112, § 2.]

SEC. 12. **REWARD BY GOVERNOR.** If any person charged with, or convicted of treason, murder, rape, robbery, burglary, arson, larceny, forgery or counterfeiting, shall break prison, escape or flee from justice, or abscond and secrete himself, in such cases it shall be lawful for the Governor, if he shall judge it necessary, to offer any reward not exceeding \$300, for apprehending and delivering such person into the custody of such sheriff or other officer as he may direct. The person so apprehending and delivering any such person as aforesaid, and producing to the Governor the receipt of the sheriff or other proper officer for the body, it shall be lawful for the Governor to certify the amount of such claim to the Auditor, who shall issue his warrant on the Treasurer for the same. [R. S. 1845, p. 263, § 8.]

SEC. 13. **REWARD BY COUNTY BOARD.** It shall be lawful for the county board of any county, by an order to be entered upon its records, to fix upon a sum not exceeding \$1,000 as a reward to be paid to any person who shall hereafter pursue and apprehend, beyond the limits of the county where the offense shall have been committed, any person guilty of any felony or other high crime, which reward shall be paid by the county where the offense was committed, on the conviction of the criminal: *Provided, nevertheless*, that said reward shall not disqualify the person entitled thereto from being a witness. [L. 1847, p. 48, § 1.]

SEC. 14. **EXPENSES ALLOWED BY COUNTY BOARD.** It shall be lawful for the county board of any county to enter an order upon their records, allowing to any person who shall have aided or assisted in the pursuit or arrest of any person suspected or accused of any felony, or other high crime, committed in their county, such reasonable sum as said county board shall deem just, to defray the expenses of the person in aiding or assisting in the pursuit or arrest of such offender in making such pursuit or arrest; which sum so allowed shall be paid out of the county treasury in the same manner that other county expenses are paid. [L. 1847, p. 48, § 2.]

SEC. 15. **REWARD FOR HORSE THIEF.** The county boards of the respective counties may offer rewards not exceeding \$1,000 each, for the pursuit,

arrest, detection or conviction of any person guilty of stealing any horse, mare, colt, mule, ass, or neat cattle, or any other property exceeding \$50 in value. [L. 1865, p. 106, § 2.]

SEC. 16. FUND RAISED BY TAX. For the purpose of providing a fund for the payment of said rewards and disbursements, the said county boards are hereby authorized to levy a tax, annually, of such amount as to them may seem necessary, for the purpose herein contemplated; said taxes to be levied and collected in the same manner as other taxes for county purposes are by law authorized to be levied and collected. [L. 1865, p. 106, § 3.]

SEC. 17. EXPENSES; PAYMENT FROM FUND. When any person shall pursue any person charged with felony, for whom no reward shall have been offered, or in any case where a reward has been offered and the pursuit shall be unsuccessful, the party pursuing may make out his bill for all necessary expenses, which shall not exceed \$1 for each man per day, and present the same to the county board, and it shall be the duty of the said board to allow said account (if satisfied of its correctness and propriety), pay the same out of said fund: *Provided*, when a reward is paid, no expenses shall be allowed, and the expenses of more than five persons shall never be paid in the same case, and only such shall be paid, in any case, as the county board shall see fit to allow. [L. 1865, p. 106, § 4.]

#### X. INDIANA.

[From the Revised Statutes of Indiana, 1881, chapter 3, article 3, sections 1599-1605, pages 302, 303.]

SECTION 1599. GOVERNOR'S WARRANT FOR ARREST OF FUGITIVE. 26. Upon the demand of the executive authority of any State or Territory of the United States upon the Governor of this State, to surrender any fugitive from justice from said State or Territory, pursuant to the Constitution and laws of the United States, he shall issue his warrant reciting the fact of such demand and the charge upon which it is based, with the time and place of the alleged commission of the offense, directed generally to any sheriff or constable of any county of this State, commanding him to apprehend said fugitive and bring him before the circuit or criminal judge of this State who may be nearest or most convenient of access to the place at which the arrest may be made; and such warrant may be executed by any sheriff or constable in this State, in his own county or in any other county in this State.

SEC. 1600. ORDER OF JUDGE. 27. The judge before whom such alleged fugitive shall be brought shall proceed, by the examination of witnesses, to ascertain if the person apprehended be the fugitive demanded and mentioned in the warrant of the Governor of this State; and if satisfied of the identity of the person, the judge shall order him to be delivered up to the agent of the State or Territory demanding him, to be transported to such State or Territory, agreeably to the laws of the United States; otherwise he shall discharge the person from custody.

**SEC. 1601. COMMITTED — NOTICE TO GOVERNOR.** 28. If no agent of the State or Territory making the demand be present; the fugitive shall be committed to the jail of the county in which the hearing before the judge is had; and such judge shall forthwith inform the Governor of this State of the fact of such commitment. And, on request by the agent of the State or Territory making the demand, upon the jailer having such fugitive in custody, and upon the order of the Governor of this State, such fugitive shall be delivered up to such agent, to be transported to the State or Territory from which he fled; and if such fugitive be not demanded within ninety days after his commitment the jailer shall discharge him.

**SEC. 1602. COSTS.** 29. All costs incurred in apprehending, securing and keeping said fugitive shall be paid by the agent of the State or Territory making the demand, before he shall be permitted to remove him or receive him into custody.

**SEC. 1603. WARRANT, WHEN REFUSED.** 30. If it shall be made to appear to the Governor before the issuing of the warrant provided for by this act, that the alleged fugitive is held in custody or on bail, to answer for any crime or misdemeanor against the laws of this State, the Governor of this State shall thereupon refuse to issue such warrant, informing the executive authority of the State or Territory making the demand, of the grounds of such refusal.

**SEC. 1604. ORDER, WHEN REFUSED.** 31. If it shall appear to the judge before whom the examination provided for by this act may be had, that the alleged fugitive is held in custody or on bail for any crime or misdemeanor against the laws of this State, such judge shall, for that reason, refuse to make an order for the delivery or removal of such fugitive, and shall immediately report the facts to the Governor of this State, who shall inform the Governor of the State or Territory making the demand thereof.

**SEC. 1605. WHEN CITIZEN NOT SURRENDERED.** 32. No citizen or resident of this State shall be surrendered under pretense of being a fugitive from justice from any other State or Territory, where it shall be clearly made to appear to the judge holding the examination provided for by this act that such citizen or inhabitant was in this State at the time of the alleged commission of the offense, and not in the State or Territory from which he is pretended to have fled; and in such case, the judge holding the examination shall discharge the person arrested, and forthwith report the facts to the Governor.

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## XI. IOWA.

[From the Revised Code of Iowa, Miller, 1880; title 25, chap. 9, §§ 4171-4184, vol. 2, pp. 991-998.]

**SECTION 4171. AGENTS APPOINTED TO APPREHEND FUGITIVE — EXPENSES.** The Governor of the State may, in any case authorized by the Constitution and laws of the United States, appoint agents to demand of the executive authority of any other State or Territory, or from the execu-

tive authority of any foreign government any fugitive from justice charged with treason or felony, and the accounts of the agents appointed for that purpose must be audited by the Auditor of the State and paid out of the State treasury.

[The expenses to be allowed agents for returning fugitives from justice shall be the fees paid the officers of the State upon whose Governor the requisition is made, and the agent shall receive not exceeding ten cents per mile, each way, for all necessary travel of himself and for each fugitive, five cents per mile additional for the number of miles which such fugitive shall have been conveyed.]

Bills for such expenses shall be made out in such manner as to show the actual route traveled, and the number of miles, and be verified by affidavit, and be accompanied by proof that the fugitive for whom requisition was made has been returned and delivered into the custody of the proper authority; *provided* that the State shall, in no case, pay the costs of returning the fugitive where he has not been tried, unless it shall be shown, to the satisfaction of the Governor, that the want of trial has not been owing to any fault or neglect on the part of the person or persons interested in the prosecution.]

SEC. 4172. NO COMPENSATION EXCEPT PROVIDED BY LAW. No compensation, fee, or reward of any kind can be paid to, or received by, a public officer of this State for a service rendered or expense incurred in procuring from the Governor the demand mentioned in the last section, or the surrender of the fugitive, or for conveying him to this State, or detaining him therein, except as provided by law.

SEC. 4173. MISDEMEANOR. A violation of the last section is a misdemeanor.

SEC. 4174. EXECUTIVE WARRANT FOR FUGITIVE, WHEN TO ISSUE. No executive warrant for the arrest and surrender of any person demanded by the executive authority of any other State or Territory, as a fugitive from the justice of such State or Territory, and no requisition upon the executive authority of any other State or Territory, for the surrender of any person as a fugitive from the justice of this State, shall be issued, unless the requisition from the executive authority of such other State or Territory, or the application for such requisition upon the executive authority of such other State or Territory shall be accompanied by sworn evidence that the party charged is a fugitive from justice, and by a duly attested copy of an indictment, or a duly attested copy of a complaint, made before a court or magistrate authorized to receive the same.

SEC. 4175. REQUISITION FROM ANOTHER STATE. Whenever a demand is made upon the Governor of this State by the executive of any other State or Territory, in any case authorized by the Constitution and laws of the United States, for the delivery of any person charged in such State or Territory with any crime, if such person is not held in custody or under bail to answer for any offense against the laws of the United States or of this State, he shall issue his warrant under the seal of the State authorizing



the agent who makes such demand either forthwith or at such time as may be designated in the warrant, to take and transport such person to the line of this State at the expense of such agent, and may also by such warrant require all peace officers to afford all needful assistance in the execution thereof.

#### EXAMINATION BY MAGISTRATE.

**SECTION 4176. WARRANT OF MAGISTRATE.** If any person be found in this State charged with any crime committed in any other State or Territory, and liable by the Constitution and laws of the United States to be delivered over upon the demand of the Governor thereof, any magistrate may, upon complaint on oath setting forth the offense and such other matters as are necessary to bring the case within the provisions of law, issue a warrant for the arrest of such person.

**SEC. 4177. BAIL.** If, upon examination, it appear that there is reasonable cause to believe the complaint true, and that such person may be lawfully demanded of the Governor, he shall, if not charged with murder, be required to enter into an undertaking, with sufficient surety in a reasonable sum, to appear before such magistrate at a future day, allowing reasonable time to obtain the warrant from the Governor, and abide the order of such magistrate in the premises.

**SEC. 4178. COMMITTED.** If such person does not give bail, or if he is charged with the crime of murder, he must be committed to prison, and there detained until such day in like manner as if the offense charged had been committed within this State.

**SEC. 4179. FORFEITURE OF BAIL.** A failure of such person to attend before the magistrate at the time and place mentioned in the undertaking is a forfeiture thereof.

**SEC. 4180. DISCHARGE.** If such person appear before the magistrate upon the day ordered he must be discharged unless he is demanded by some person authorized by the warrant of the Governor to receive him, or unless the magistrate see good cause to commit him or to require him to enter into a new undertaking for his appearance at some other day to await a warrant from the Governor.

**SEC. 4181. RE-ARREST ON GOVERNOR'S WARRANT.** Whether the person so charged be bound to appear, be committed, or discharged, any person authorized by the warrant of the Governor may at any time take him into custody, and the same is a discharge of the undertaking, if there be one.

**SEC. 4182. COSTS.** The complainant in any such case is answerable for all the costs and charges, and for the support in prison of any person so committed, and the magistrate before issuing his warrant or hearing the cause must require the complainant to give security for the payment of all such costs, or may require them in advance.

**SEC. 4183. CONDITION AS TO EXPENSE BEFORE APPOINTING AGENT.** Upon the appointment of any agent for the arrest of a fugitive from justice under the provisions of this chapter, the Governor is hereby authorized to make it

a condition upon such appointment, and the issue of the writ, that the same shall be executed without expense to the State, if in his opinion justice and equity so require.

**SEC. 4184. WHEN EXPENSES ARE PAID BY STATE.** When, in the opinion of the Governor, expenses incurred in the arrest of fugitives from justice should be paid by the State, such expenses shall be made out by items in detail, and sworn to, and approved by him and at least two other members of the executive council, and when so approved shall be audited and paid out of the general revenue of the State, and this section shall be sufficient authority for the payment of the same.

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## XII. KANSAS.

[From the Compiled Laws of Kansas, Dassler, 1881, Chap. 44, §§ 2669 to 2688, pages 466-468, and Chap. 82, §§ 4562, 4804, 4812, pages 741, 767 and 768, and Chap. 53, § 2954, page 514.]

(2669.) **SECTION 1. GOVERNOR TO ISSUE WARRANT.** Whenever the executive of any other State or Territory shall demand of the executive of this State any person as a fugitive from justice, and shall have complied with the requisites of the act of Congress, in that case made and provided, it shall be the duty of the Governor of this State to issue his warrant, under the seal of the State, directed to any sheriff, coroner or other person whom he may think fit to intrust with the execution of such warrant.

(2670.) **SEC. 2. WARRANT.** The warrant shall authorize the officer or person to whom it is directed, to arrest the fugitive anywhere within the limits of this State, and convey him to any place therein named, and shall command all sheriffs, coroners, constables and other officers to whom the warrant may be shown, to aid and assist in the execution thereof.

(2671.) **SEC. 3. EXECUTION OF WARRANT.** Every warrant so issued may be executed in any part of the State; and the officer or person to whom it is directed shall have the same power to command assistance therein, and in receiving and conveying to the proper place any person duly arrested by virtue thereof, as sheriffs and other officers by law have in the execution of civil or criminal process directed to them, with like penalties on those who refuse their assistance.

(2672.) **SEC. 4. PRISONER MAY BE CONFINED IN JAIL.** The officer or person executing such warrant may, when necessary, confine the prisoner arrested by him in the jail of any county through which he may pass in conveying such prisoner to the place commanded in the warrant; and the keeper of such jail shall receive and safely keep such prisoner, until the person having him in charge shall be ready to proceed on his route.

(2673.) **SEC. 5. EXPENSES.** The expenses which may accrue under the foregoing sections of this act, being first ascertained to the satisfaction of the executive, shall, on his certificate, be allowed and paid out of the State treasury.

(2674.) SEC. 6. FUGITIVE FROM OTHER STATE. When any person within this State shall be charged, on the oath or affirmation of any credible witness, before any judge or justice of a court of record, or a justice of the peace, with the commission of any crime in any other State or Territory of the United States, and that he fled from justice, it shall be lawful for the judge or justice to issue his warrant for the apprehension of the party charged.

(2675.) SEC. 7. ON EXAMINATION; BAIL. If, upon examination, it shall appear to the judge or justice that the person charged is guilty of the crime alleged, he shall commit him to the jail of the county; or, if the offense is bailable, take bail for his appearance at the next term of the district court in the county.

(2676.) SEC. 8. EXAMINATION, HOW CONDUCTED. The judge or justice shall proceed in the examination in the same manner as is required when a person is brought before such officer charged with an offense against the laws of this State, and shall reduce the examination to writing, and make return thereof as in other cases, and shall also send a copy of the examination and proceedings to the Governor of this State, without delay.

(2677.) SEC. 9. DUTY OF GOVERNOR. If, in the opinion of the Governor, the examination contains sufficient evidence to warrant the finding an indictment, he shall forthwith notify the executive of the State or Territory in which the crime is alleged to have been committed of the proceedings against the person arrested, and that he will be delivered on demand, without requiring a copy of an indictment to accompany the demand.

(2678.) SEC. 10. OFFENDER TO BE DELIVERED UP. When a demand shall be made for the offender, the Governor shall forthwith issue his warrant, under the seal of the State, to the sheriff of the county wherein the party charged is committed or bailed, commanding him to surrender the accused to such messenger as shall be therein named, to be conveyed out of the State.

(2679.) SEC. 11. TO BE ARRESTED. If the accused shall be at large, on bail or otherwise, it shall be lawful for the sheriff to arrest him forthwith, anywhere within the State, and to surrender him agreeably to the command of the warrant.

(2680.) SEC. 12. DISCHARGE AND RECOGNIZANCE. In all cases where the party shall have been admitted to bail and shall appear according to the condition of his recognizance, and he shall not have been demanded, the district court may discharge the recognizance or continue it, according to the circumstances of the case, such as distance of the place where the offense is alleged to have been committed, the time since the arrest, the nature of the evidence, and the like.

(2681.) SEC. 13. LIMITATION OF IMPRISONMENT. In no case shall the party be kept in prison or held to bail beyond the end of the second term

of the district court after the arrest, and, if no demand is made for him within that time, he shall be discharged.

(2682.) SEC. 14. FORFEITED RECOGNIZANCE. When any such recognizance shall be forfeited, it shall inure to the benefit of the State.

(2683.) SEC. 15. BOND AND SECURITY FOR COSTS. When a complaint shall be made against any person, as provided by this act, the judge or justice shall take from the prosecutor a bond to the clerk of the district court, with sufficient security to secure the payment of the costs and expenses which may accrue by occasion of the arrest and detention of the party charged, which bond shall be certified and returned, with the examination, to the office of the clerk of the district court.

(2684.) SEC. 16. COSTS, HOW COLLECTED. Upon the determination of the proceedings in that court, the clerk may issue fee bills, which shall be served on the principal securities in the bond by the sheriff, in the same manner as other fee bills, for which service the sheriff shall be allowed the same fees as for serving notices.

(2685.) SEC. 17. EXECUTION FOR COSTS. If the costs and charges are not paid on or before the first day of the next term of the district court, nor any cause shown why they should not be paid, the clerk may issue execution for the same against the parties on whom the fee bills were served.

(2686.) SEC. 18. CLERK MAY SUE ON BOND. Nothing in the two preceding sections shall be construed to prevent the clerk from instituting suit on such bond for the recovery of the costs and charges.

(2687.) SEC. 19. NO AUTHORITY OTHER THAN THIS ACT. No person shall take or remove any fugitive from this State, or do any act toward such removal, unless authorized to do so pursuant to the provisions of this act; and any person violating the provisions of this section shall forfeit and pay to the aggrieved party a sum not less than five hundred dollars.

(2688.) SEC. 20. PERSON MAY BE BAILED. Whenever any person shall have been committed to the jail of any county, upon examination for a bailable offense, under the provisions of this act, he may be let to bail with sufficient surety for his appearance at the next term of the court of the county having criminal jurisdiction, such bail to be taken and approved by the court, or judge of the court having criminal jurisdiction, or the probate judge.

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(4562.) SEC. 70. FUGITIVE FROM JUSTICE. Any fugitive from justice, against whom an information may be filed, may be demanded by the Governor of this State of the executive authority of any other State or Territory, or of any foreign Government, in the same manner, and the same proceedings may be had thereon as provided by law in like cases of demand upon indictment found.

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(4801.) SEC. 314. SECURING FUGITIVE FROM JUSTICE. Before the Governor of this State shall demand any fugitive from justice from the execu-

tive of any other State or Territory, the county attorney of the county where the crime is alleged to have been committed shall examine into the case, and if satisfied that a crime has been committed and that the person charged is the guilty person, he shall so certify to the Governor upon the affidavit, information or indictment presented, and ask a requisition to be made in accordance therewith; and the Governor may issue his warrant, under the seal of the State, directed to the agent or messenger recommended by the said county attorney, commanding him to receive such fugitive, and convey him to the sheriff of the county in which the offense was committed or is by law cognizable.

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(4812.) SEC. 322. REWARD FOR FUGITIVES. If any person charged with, or convicted of, a felony, shall break prison, escape or flee from justice, and abscond or secrete himself, the Governor of this State may, if he deems it expedient, offer any reward, not exceeding three hundred dollars, for the apprehension and delivery of such person to the custody of such sheriff, or other officer, as he may direct.

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(2954.) SEC. 17. CONFINEMENT OF FUGITIVE FROM JUSTICE. Any county jail may be used for the safe-keeping of any fugitive from justice from another State or Territory, and the jailer shall, in such case, be entitled to reasonable compensation for the support and custody of such fugitive from justice, to be paid by the officer demanding the custody of the same.

### XIII. KENTUCKY.

[From General Statutes of Kentucky, Bullitt & Feland, 1881, chap. 15, § 5, p. 193, and chap. 45, articles 1 and 2, pp. 492, 494.]

SECTION 5. GOVERNOR MAY OFFER REWARD—MODE OF AUTHENTICATING CLAIM. The reward offered by the Governor of this Commonwealth, not exceeding five hundred dollars, for the apprehension and delivery into the custody of the proper officer named in the proclamation, a fugitive from the justice of this Commonwealth, upon the production of the officer's receipt of the fugitive, approved and certified by the circuit court of the county of his residence.

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#### Article 1. *Fugitives from justice, how dealt with.*

SECTION 1. DUTY OF GOVERNOR. Upon the demand of the executive of any State or Territory of the United States, made upon the Governor of this Commonwealth, to surrender a fugitive from justice from said State or Territory, pursuant to the Constitution and laws of the United States, he shall issue his warrant to the sheriff or constable of any county within this Commonwealth, commanding him to apprehend said fugitive and bring him before some circuit judge.

SEC. 2. PROCEEDINGS. The circuit judge shall proceed, by the exam-

ination of witnesses, to ascertain if the person apprehended be the fugitive demanded and mentioned in the warrant of the Governor of this State, and, if satisfied of the identity of the person, the judge shall order him to be delivered up to the agent of the State or Territory demanding him, to be transported to such State or Territory agreeably to the laws of the United States ; otherwise he shall discharge the person from custody.

SEC. 3. WHEN FUGITIVE TO BE COMMITTED TO JAIL. If no such agent be present, the fugitive shall be committed to the jail of the county in which the hearing before the judge is had. Of the fact of commitment the judge shall forthwith inform the Governor of this State, and, on demand by the agent of the State or Territory upon the jailer, by the authority of the Governor of this Commonwealth, the fugitive from justice shall be delivered up to such agent. If said fugitive be not demanded within three months after his commitment, the jailer shall discharge him.

SEC. 4. COSTS. All costs incurred in apprehending and securing said fugitive shall be paid by the agent of the State or Territory, before he shall be permitted to remove him or receive him into custody.

Article 2. *Arrest of persons for offenses committed in another State or Territory.*

SECTION 1. HOW FUGITIVE TO BE DELIVERED. A person guilty of felony anywhere in the United States, if found in this State, may be arrested and confined in jail, and delivered over to the proper authority, in the following manner:

1. A warrant issued by any judicial authority, upon affidavit made of the facts, shall authorize his arrest by any ministerial officer, or other person, to whom it may be directed by name.

2. The person arresting the accused shall immediately take him before the circuit judge, the judge of the county court, or the police judge of a city, in the county in which he was arrested, who shall, upon hearing the evidence, if satisfied of the guilt of the prisoner, commit him to the jail of the county, where he was arrested, there to remain sixty days, unless he be legally discharged, or removed upon the demand of the executive of the State or Territory in which it is charged that the offense was committed.

SEC. 2. EXECUTIVE OF FOREIGN STATE TO BE NOTIFIED. It shall be the duty of the person who caused the arrest of such fugitive to be made, to notify the executive of the State or Territory in which the crime was committed.

SEC. 3. POWER OF GOVERNOR TO ISSUE WARRANT. The Governor of this Commonwealth, upon a proper demand made, shall issue his warrant directing the officer having the custody of the prisoner to deliver him to the agent of the State or Territory demanding him, whose duty it shall be to deliver over such prisoner, upon the payment of all legal costs and charges by said agent or other person.

**SEC. 4. PROCLAMATION FOR REWARD.** Whenever the Governor of this Commonwealth shall issue his proclamation, offering a reward for a fugitive from justice, or any one charged with crime, he may order the same published in a newspaper or not, as he shall deem proper under the circumstances and to the interest of the Commonwealth, and if he shall order the same so published, he shall designate the paper or papers in which the publication shall be made, and the number of times it shall be inserted. The account for such publication, with the approval of the Governor indorsed thereon, shall be paid out of the public treasury.

**SEC. 5. COMPENSATION OF AGENT.** In all cases where the Governor of this Commonwealth shall make a requisition upon the Governor of any other State or Territory for a fugitive from justice, the person named in such requisition, as the agent of this Commonwealth, shall, unless a different condition is contained in the commission of the agent, be allowed to receive, as a compensation for his services, at the rate of twelve and a half cents per mile for the distance he may travel to and from the county seat of the county having jurisdiction of the offense of which said fugitive stands charged, to the place where said fugitive may be arrested—the distance to be computed by the route most usually traveled—and such other fees and necessary expenses as he may have to expend in reclaiming and transporting such fugitive.

**SEC. 6. CLAIM, HOW ALLOWED.** The claims provided for in this chapter to be allowed by the Governor, and for the amount of which the Auditor will draw his warrant upon the Treasurer.

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#### XIV. LOUISIANA.

[From Voorhies' Revised Laws of Louisiana, second edition, 1884, §§ 1038-1041, pp. 178, 179.]

**SECTION 1038. FUGITIVES TO BE ARRESTED.** When any person shall be charged on oath of any credible person, before any judge or justice of the peace of this State, with having committed any crime within any State or Territory of the United States, and has fled from justice, it shall be the duty of such judge or justice to issue his warrant for the arrest of such accused, and to proceed to the examination of such case, and commit or discharge the accused as such judge or justice may determine, provided no person so accused shall be detained in custody exceeding ninety days.

**SEC. 1039. GOVERNOR AUTHORIZED TO DELIVER FUGITIVES.** The Governor may, in his discretion, deliver over to justice any person found within the State who shall be charged with having committed any crime under the Constitution and laws of the United States or of any State or Territory.

**SEC. 1040. DELIVERY, WHEN AND HOW MADE.** Such delivery shall only be made on the requisition of the duly authorized ministers or officers of the Government within the jurisdiction of which the crime shall be charged to have been committed, and upon their paying all expenses attending the apprehension, confinement and delivery of the party accused.

SEC. 1041. GOVERNOR TO REQUIRE EVIDENCE OF GUILT. It shall be the duty of the Governor to require such evidence of the guilt of the persons so charged as would be necessary to justify his apprehension and commitment for trial had the crime charged been committed within the State.

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XV. MAINE.

[From the Revised Statutes, 1888, title 11, chap. 138, §§ 8-14, pages 957-8.]

SECTION 8. GOVERNOR MAY APPOINT AGENT TO DEMAND FUGITIVE. In any case, authorized by the Constitution and laws of the United States, the Governor may appoint an agent to demand and receive of the executive authority of any other State any fugitive from justice charged with any crime in this State, and the accounts of such agent shall be audited and paid from the treasury by order of the Governor and Council.

SEC. 9. REWARD FOR THE ARREST AND RETURN OF FUGITIVES. Whenever a prisoner convicted of, or charged with, a capital crime or other high offense, escapes from prison in this State, or there is reasonable cause to believe that a person who is charged with such offense and has not been apprehended therefor, cannot be arrested and secured in the ordinary course of proceedings, the Governor may, upon application in writing of the Attorney-General or county attorney for the county in which such offense was committed, and upon such terms and conditions as he deems expedient and proper, offer a suitable reward, not exceeding \$1,000, for the arrest, return and delivery into custody of such escaped prisoner or fugitive from justice, and upon satisfactory proof that the terms and conditions of such offer have been complied with, he may, with the advice and consent of Council, draw his warrant upon the Treasurer for the payment thereof.

FUGITIVES FROM JUSTICE FROM OTHER STATES.

SECTION 10. GOVERNOR MAY ISSUE WARRANT. When such demand as is mentioned in section eight is made on the Governor of this State, and he is satisfied, on examination of the grounds thereof, that it is according to law and ought to be granted, he shall issue his warrant, under the seal of the State, authorizing the agent making the demand, at his own expense, to take and transport such fugitive to the line of the State at the time designated in the warrant, and shall therein require the civil officers of the State to afford all needful aid in its execution.

SEC. 11. WHEN THE COURT OR MAGISTRATE MAY ISSUE WARRANT. When such fugitive from justice in another State is found in this State, any court or magistrate authorized to issue warrants in criminal cases may, on complaint under oath, setting forth the offense and other facts necessary to bring the case within the provisions of law, grant a warrant and have the accused arrested for examination as in other cases.



**SEC. 12. EXAMINATION.** On such examination, if the court or magistrate believes that the complaint is true, and that the accused can lawfully be demanded of the Governor, the case shall be adjourned long enough to obtain an executive warrant; and if the offense is bailable, the accused may recognize with sufficient sureties to appear at the adjournment; and if he does not so recognize, or the offense is not bailable, he shall be committed; and if any such recognizance is forfeited, the same proceedings shall be had as in case of other recognizances.

**SEC. 13. DISCHARGE.** If the accused appears at the adjournment, he shall be discharged, unless some person is authorized to receive him by an executive warrant, or another adjournment is ordered for sufficient cause, and in that case the same proceedings shall be had as at the first adjournment; but nothing in this, or the two preceding sections, shall prevent the arrest of any accused by an executive warrant, and such arrest discharges any such existing recognizance.

**SEC. 14. DISCHARGE FOR NON-PAYMENT OF COSTS, ETC.** The complainant is answerable in all such cases for the actual costs and charges and the support in prison of the accused when committed, to be paid as a creditor pays for his debtor committed on execution; and if his support in prison is not so paid, the jailer may discharge the accused as if he were committed on execution for debt.

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#### XVI. MARYLAND.

[From Revised Code of Maryland, Mayer, Fischer and Cross, 1878, title xxvii, article 72, paragraphs 182 and 183, page 822.]

**182. ONE ESCAPING AFTER CONVICTION TO BE DEEMED A FUGITIVE.** If any offender, sentenced to undergo a confinement in the penitentiary, shall escape, he shall, on conviction thereof, suffer such additional confinement and hard labor, agreeably to the laws of this State, as the Criminal Court of Baltimore shall adjudge and direct; and if any keeper, deputy, assistant keeper, or other person, shall aid or assist in the escape of any offender confined in the penitentiary, he shall, on conviction thereof by the Criminal Court of Baltimore, undergo such confinement in the said penitentiary as the said court may adjudge, not less than eighteen months nor more than ten years.

**183. FUGITIVE CONVICTS DEEMED FUGITIVES.** Any person who has been convicted and condemned to serve and labor as a criminal, and who may escape and be found in this State shall be deemed a fugitive felon, and being thereof convicted by a duly authenticated record, from the court of the State in which such conviction and condemnation took place, shall be sentenced to undergo a confinement in the penitentiary of this State for and during the residue of the term for which such person shall have been condemned; but, if such person shall be demanded by the State whence he escaped, he shall be immediately delivered up agreeably to such demand.

## XVII. MASSACHUSETTS.

[From the Public Statutes of Massachusetts, 1882, chap. 218, §§ 1-11, pages 1212-1218.]

**SECTION 1. AUTHORITY OF GOVERNOR IN CASE OF FUGITIVES.** The Governor of this State, in any case authorized by the Constitution and laws of the United States, may, on demand, deliver over to the executive of any other State or Territory any person charged therein with treason, felony, or other crime, or may, on application, appoint an agent to demand of the executive authority of any other State or Territory any such offender fleeing from the justice of this State: *Provided*, that such demand or application is accompanied by sworn evidence that the party charged is a fugitive from justice, and by a duly attested copy of an indictment, or of a complaint made before a court or magistrate authorized to receive the same; such complaint to be accompanied by affidavits to the facts constituting the offense charged, by persons having actual knowledge thereof, and such further evidence in support thereof as the Governor may require.

**SEC. 2. EXAMINATION BY ATTORNEY-GENERAL.** When such demand or application is made the Attorney-General or other prosecuting officer shall, if the Governor require it, forthwith investigate the grounds thereof, and report to the Governor all the material facts which may come to his knowledge, with an abstract of the evidence in the case, and especially in case of a person demanded, whether he is held in custody or is under recognizance to answer for any offense against the laws of this State or of the United States, or by force of any civil process, with an opinion as to the legality or expediency of complying therewith.

**SEC. 3. PROCEEDINGS ON DEMAND.** If the Governor is satisfied that the demand is conformable to law and ought to be complied with, he shall issue his warrant, under the seal of the Commonwealth, to some officer authorized to serve warrants in criminal cases, directing him at the expense of the agent making the demand, at a time designated in the warrant, to take and transport such person to the line of this State, and there deliver him over to such agent, and such officer may require aid as in criminal cases.

**SEC. 4. APPLICATION FOR WRIT OF HABEAS CORPUS.** No person arrested upon such warrant shall be delivered over to such agent of a State or Territory until he has been notified of the demand made for his surrender, and had opportunity to apply for a writ of *habeas corpus*, if he claimed such right of the officer making the arrest; and when such writ is applied for, notice thereof, and of the time and place of hearing thereon, shall be given to the Attorney-General, or other prosecuting officer for the district within which the arrest was made.

**SEC. 5. PENALTY.** An officer who delivers over to such agent for extradition a person in his custody upon such warrant without having complied with the provisions of the preceding section, shall forfeit a sum not exceeding \$1,000.

**SEC. 6. FEES, HOW PAID.** If the application for the arrest of a fugi-

tive from the justice of the State is complied with and an agent appointed, his account shall be audited and paid by the State.

SEC. 7. ARREST BY MAGISTRATES. When a person is found in this State charged with an offense committed in another State or Territory, and liable by the Constitution and laws of the United States to be delivered over upon the demand of the executive of such other State or Territory, any court or magistrate authorized to issue warrants in criminal cases may, upon complaint under oath setting forth the offense and such other matters as are necessary to bring the case within the provisions of law, issue a warrant to bring the person charged before the same, or some other court or magistrate within the State, to answer to such complaint as in other cases.

SEC. 8. WHEN FUGITIVE MAY GIVE RECOGNIZANCE, ETC. If, upon the examination of the person charged, it appears to the court or magistrate that there is reasonable cause to believe that the complaint is true, and that such person may be lawfully demanded of the executive, he shall, if not charged with a capital crime, be required to recognize with sufficient sureties in a reasonable sum to appear before such court or magistrate at a future day (allowing a reasonable time to obtain the warrant of the executive), and to abide the order of the court or magistrate.

SEC. 9. FUGITIVE, WHEN TO BE COMMITTED, ETC. If such person does not so recognize, he shall be committed to prison and there detained until such day, in like manner as if the offense charged had been committed within this State; and if the person recognizing fails to appear according to the condition of his recognizance, he shall be defaulted, and like proceedings shall be had as in case of other recognizances entered into before such court or magistrate. If the person is charged with a capital crime, he shall be committed to prison and there detained until the day so appointed for his appearance.

SEC. 10. PROCEEDINGS, HOW CONDUCTED. If the person so recognized or committed appears before the court or magistrate upon the day ordered, he shall be discharged unless he is demanded by some person authorized by the warrant of the executive to receive him, or unless the court or magistrate sees cause to commit him or to require him to recognize anew for his appearance on some other day, and if, when ordered, he does not so recognize, he shall be committed and detained as before; *provided*, that whether the person charged is recognized, committed, or discharged, any person authorized by the warrant of the executive may, at all times, take him into custody, and the same shall be a discharge of the recognizance, and not be deemed an escape.

SEC. 11. EXPENSES. The complainant in such case shall be answerable for all actual costs and charges, and for the support in prison of any person so committed, to be paid in like manner as by a creditor for his debtor committed on execution. If the charge for support in prison is not so paid, the jailer may discharge such person in like manner as if he had been committed on an execution.

## XVIII. MICHIGAN.

[From Howell's Statutes, 1882, chap. 338, title XI, §§ 9622-9627, vol. 2, pages 2312-2314; also, §§ 9555 and 8939, vol. 2, pages 2299 and 2172.]

SECTION 9622 (6121, 8006). SEC. 8. DUTY OF GOVERNOR IN CASE OF FUGITIVES. If the Governor shall be satisfied that the demand is conformable to law and ought to be complied with, he shall issue his warrant, under the seal of the State, authorizing the agents who make such demand, either forthwith, or at such time as shall be designated in the warrant, to take and transport such person to the line of this State, at the expense of such agents, and shall also by such warrant require the civil officers within this State to afford all needful assistance in the execution thereof.

SEC. 9623 (6123, 8007). SEC. 9. ARREST OF FUGITIVES BY MAGISTRATES. Whenever any person shall be found within this State charged with any offense committed in any other State or Territory, and liable by the Constitution and laws of the United States to be delivered over upon the demand of the Governor of such other State or Territory, any court or magistrate authorized to issue warrants in criminal cases, may, upon complaint on oath, setting forth the offense, and such other matters as are necessary to bring the case within the provisions of the law, issue a warrant to bring the person so charged before the same or some other court or magistrate, within this State, to answer to such complaint as in other cases.

SEC. 9624 (6123, 8008). SEC. 10. REQUIRED TO RECOGNIZE. If, upon the examination of the person charged, it shall appear to the court or magistrate that there is reasonable cause to believe that the complaint is true, and that such person may be lawfully demanded of the Governor, he shall, if not charged with a capital crime, or with murder in the first degree, be required to recognize, with sufficient sureties, in a reasonable sum, to appear before such court or magistrate at a future day, allowing a reasonable time to obtain the warrant of the Governor, and to abide the order of such court or magistrate in the premises.

SEC. 9625 (6124, 8009). SEC. 11. REFUSAL TO RECOGNIZE. If such person shall not recognize, or if he shall be charged with a capital crime, or with the crime of murder in the first degree, he shall be committed to prison and there detained until such day, in like manner as if the offense charged had been committed within this State; and, if the person so recognizing shall fail to appear according to the condition of his recognizance, he shall be defaulted, and the same proceedings shall be had as in the case of other recognizances entered into before such court or magistrate.

SEC. 9626 (6125, 8010). SEC. 12. HOW TO BE PROCEEDED WITH. If the person so recognized or committed shall appear before the court or magistrate upon the day ordered, he shall be discharged, unless he shall be demanded by some person authorized by the warrant of the Governor to receive him, or unless the court or magistrate shall see cause to commit him, or to require him to recognize anew for his appearance at some other day; and if, when ordered, he shall not so recognize, he shall be committed and detained as before: *Provided*, that whether the person so charged shall be

recognized, committed, or discharged, any person authorized by the warrant of the Governor may, at all times, take him into custody, and the same shall be a discharge of the recognizance, if any, and shall not be deemed an escape.

SEC. 9627 (6126, 8011). SEC. 13. EXPENSES, HOW PAID. The complainant in any such case shall be answerable for all the actual costs and charges, and for the support in prison of any person so committed, to be paid weekly, or otherwise, as may be ordered by the court or magistrate; and, if the charge for his support in prison shall not be so paid, the jailer may, on the failure of the complainant, discharge such person from his imprisonment.

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SEC. 9555 (7944). SEC. 8. EXAMINATION OF FUGITIVE. No information shall be filed against any person for any offense until such person shall have had a preliminary examination therefor, as provided by law, before a justice of the peace, or other examining magistrate or officer, unless such person shall waive his right to such examination: *Provided, however*, that information may be filed without such examination against fugitives from justice, and any fugitive from justice against whom an information shall be filed may be demanded by the Governor of this State of the executive authority of any other State or Territory, or of any foreign government, in the same manner, and the same proceedings may be had thereon as provided by law in like cases of demand upon indictment filed.

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SEC. 8939 (5575, 7362). SEC. 1. DUTY OF SHERIFFS. It shall be the duty of the sheriffs of the several counties of this State to receive into their respective jails and keep all prisoners who shall be committed to the same by virtue of any civil process issued by any court of record instituted under the authority of the United States, until they shall be discharged by the due course of the laws of the United States, in the same manner as if such prisoner had been committed by virtue of process in civil actions issued under the authority of this State; and every such sheriff may receive to his own use such sums of money as shall be payable by the United States for the use of the said jails: *Provided*, that nothing in this or the next succeeding section contained shall be construed to authorize or require any sheriff or other officer to receive into or detain, or permit any person to receive into or detain in any of said jails or other public buildings, any person claimed as a fugitive slave. *And, provided further*, that every sheriff or other officer, or keeper of a prison, is hereby peremptorily prohibited from receiving or detaining, or permitting to be received or detained, in any such jails or other public buildings, any such fugitive slave as aforesaid; every sheriff or other officer, or keeper of a prison, who shall offend against the last preceding provision of this section shall be liable to an indictment for a misdemeanor, and upon conviction thereof shall pay a fine of \$1,000 and be imprisoned in the county jail one year. (As amended Laws of 1855, p. 415, Feb. 13, act 415.)

## XIX. MINNESOTA.

[From the statutes of Minnesota, Young, 1878, chap 103, §§ 1-7, pages 926-928, as amended by Laws 1879, chap. 44 and chap. 120, title 1, § 4, page 968.]

**SECTION 1. AGENTS TO DEMAND FUGITIVES.** The Governor may, in any case authorized by the Constitution and laws of the United States, appoint agents to demand of the executive authority of any State or Territory, any fugitive from justice, or any person charged with felony or any other crime in this State; and whenever an application is made to the Governor for that purpose, the Attorney-General, when required by the Governor, shall forthwith investigate, or cause to be investigated by any county attorney, the grounds of such application, and report to the Governor all material circumstances which may come to his knowledge, with an abstract of the evidence, and his opinion as to the expediency of the demand; and the accounts of the agents appointed for such purpose shall, in all cases, be audited by the Governor, and paid from the State treasury: *Provided, however,* that the Governor when issuing his warrant shall deliver the same to the sheriff or some other public officer of any county in this State, and such officer, upon receipt of such warrant, shall have power to arrest and detain in his custody the person whose surrender is demanded, but no such person arrested upon such warrant shall be delivered to the agent designated therein, or to any other person, until the person so arrested and whose surrender is demanded shall be notified of the demand made for his surrender, and of the nature of the criminal charge made against him, and not until he has had an opportunity to apply for a writ of *habeas corpus*, if he claims such right, of the officer making the arrest. When such writ is applied for notice thereof and of the time and place of the hearing thereon shall be given to the Attorney-General or other prosecuting officer of the judicial district in which the arrest is made. Any sheriff or other officer making such arrest who shall deliver over to the agent named in such warrant, or to any other person, for extradition, the person so in his custody under such warrant, without having complied with the provisions of this act, shall upon conviction thereof be fined in any sum not exceeding one thousand dollars, or imprisoned in the common jail of the county not exceeding six months, or be subject to both fine and imprisonment at the discretion of the court. [As amended 1879, chap. 44, § 1.]

**SEC. 2. DEMAND FROM ANOTHER STATE.** When a demand is made upon the Governor by the executive of any State or Territory, in any case authorized by the Constitution and laws of the United States, for the delivery over of any person charged in such State or Territory with treason, felony or any other crime, the Attorney-General, when required by the Governor, shall forthwith investigate the ground of such demand, or cause the same to be investigated by any county attorney, and report to the Governor all material facts which may come to his knowledge as to the situation and circumstances of the person so demanded, especially whether he is held in custody, or is under recognizance, to answer for any offense

against the laws of the State or of the United States, and also whether such demand is made according to law, so that such person ought to be delivered up; and if the Governor is notified that such demand is conformable to law, and ought to be complied with, he shall issue his warrant, under the seal of the State, authorizing such person as he shall name therein, either forthwith or at the time designated by the warrant, to take and transport the person so demanded to the line of the State at the expense of the State or Territory in whose name such person may have been demanded, and to deliver over such person, at the line of the State, to the agent of the State or Territory making such demand; and shall also, by such warrant, require the civil officers within this State to afford all needful assistance in the execution thereof. [As amended 1874, chap. 15, § 1.]

SEC. 3. ARREST OF FUGITIVES BY MAGISTRATES. Whenever any person is found within this State charged with any offense committed in any State or Territory, and liable by the Constitution and laws of the United States to be delivered over upon the demand of the executive of such State or Territory, any court or magistrate authorized to issue warrants in criminal cases may, upon complaint under oath, setting forth the offense and such other matters as are necessary to bring the case within the provisions of law, issue a warrant to bring the person so charged before the same or some other court or magistrate within the county where such person is found.

SEC. 4. MAY GIVE RECOGNIZANCE WHEN—FAILURE TO APPEAR. If, upon examination of the person charged, it appears to the court or magistrate there is reasonable cause to believe that the complaint is true, and that such person may be lawfully demanded of the Governor, he shall, if the offense is bailable, be required to recognize with sufficient sureties, in a reasonable sum, to appear before such court or magistrate at a future day, allowing a reasonable time to obtain the warrant of the executive, and to abide the order of the court or magistrate, and if such person shall not so recognize, he shall be committed to prison, and there detained until such day, in like manner as if the offense charged had been committed within this State; and if the person so recognizing fails to appear according to the condition of his recognizance, he shall be defaulted, and the like proceeding shall be had as in case of other recognizances entered into before such court or magistrate; but if the offense is not bailable, he shall be committed to prison, and there detained until the day so appointed for his appearance before the court or magistrate.

SEC. 5. SHALL BE DISCHARGED, WHEN. If the person so recognized or committed appears before the court or magistrate upon the day ordered he shall be discharged unless he is demanded by some person authorized by the warrant of the executive to receive him, or unless the court or magistrate sees cause to commit him, or to require him to recognize anew, for his appearance at some other day; and if, when ordered, he shall not so recognize, he shall be committed and detained as before provided; whether the person so discharged is recognized, committed or discharged, any per-

son authorized by the warrant of the executive may at all times take him into custody, and the same is a discharge of the recognizance, if any, and shall not be deemed an escape.

**SEC. 6. COMPLAINANT LIABLE FOR EXPENSES.** The complainant in such case shall be answerable for the actual costs and charges, and for the support in prison, of any person so committed, and shall advance to the jailer one week's board at the time of commitment, and so from week to week so long as such persons shall remain in jail; and if he fails so to do, the jailer may forthwith discharge such person from custody.

**SEC. 7. CONVEYING PRISONERS THROUGH THIS STATE.** Any person who has been or shall be convicted of or charged with any crime, in any other State or Territory of the United States, and who shall be lawfully in the custody of any officer of the State or Territory where such offense is claimed to have been committed, may be by said officer conveyed from and through this State, for which purpose said officer shall have all the powers in regard to the control and custody of said prisoner, that an officer of this State has over a prisoner in his charge. [1877, chap. 104, § 1.]

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**SEC. 4. FUGITIVES TO BE KEPT IN ANY JAIL.** Any county jail may be used for the safe-keeping of any fugitive from justice in this State, in accordance with the provisions of any act of Congress; and the jailer shall be entitled to reasonable compensation for the support and custody of such fugitive from the officer having him in custody.

## XX. MISSISSIPPI.

[From Revised Code of Mississippi, Campbell, 1880, chap. 7, § 198, page 94; and chap. 78, §§ 3120-3125, pages 798, 799.]

**SECTION 198. DUTY OF GOVERNOR AS TO ARREST OF FUGITIVES.** It shall be the duty of the Governor of this State, on demand made by the executive authority of any other State, Territory or district, for any person charged, on affidavit or indictment, in such other State, Territory or district, with a criminal offense (and who shall have fled from justice, and be found in this State), accompanied with a copy of such affidavit or indictment, certified as authentic by such executive authority, to cause such offender to be arrested and delivered up to the authority of such State, Territory or district, for removal to the jurisdiction having cognizance of such offense, upon the payment of the costs and expenses consequent on such arrest; and it shall be the duty of the Governor, in like manner, to demand and receive fugitives from justice, for offenses committed in this State.

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**SEC. 3120. ARREST OF FUGITIVES BY MAGISTRATES.** Any justice of the peace or other conservator of the peace, upon complaint on oath made before him, or on other satisfactory evidence, that any person found within



this State has committed treason, felony or other crime, in some other State or Territory, and has fled from justice, may issue a warrant for the arrest of such person, as if the offense had been committed in this State.

**SEC. 8121. BAIL, HOW FURNISHED.** If it shall appear to the justice of the peace or other officer before whom such person shall be brought, that there is reasonable cause to believe that the complaint is true, he shall, if the prisoner would be entitled to bail, if the offense had been committed in this State, require him to furnish bail to appear before the circuit court of the county at its next term and from day to day and term to term until discharged by law, and, if such person shall not give bail with sufficient sureties as required, he shall be committed to jail until he shall give such bail, or until he shall be discharged as hereinafter provided. If such person would not be bailable, if the offense charged had been committed in this State, he shall be committed to jail to remain until discharged as hereinafter provided.

**SEC. 8122. PROCEEDINGS THEREON.** Any recognizance or bond so taken shall be delivered at once to the clerk of the circuit court before which the party is bound to appear, and like proceeding shall be had thereon as in case of other recognizances to appear before said court.

**SEC. 8123. DUTY OF COMMITTING MAGISTRATE.** The justice of the peace or other officer recognizing or committing such person shall immediately report the fact to the Governor of this State, who shall thereupon communicate the information to the executive of the State or Territory in which the offense is charged to have been committed.

**SEC. 8124. WHEN FUGITIVE TO BE DISCHARGED.** If the person so recognized shall appear before the circuit court, according to his obligation, he shall be discharged by such court, unless he shall be demanded by some person authorized by the Governor of this State to demand him, or unless such court shall commit him, if he was improperly admitted to bail, or shall recognize him anew, if his recognizance be insufficient, or shall order his recognizance as first given to continue in force for a longer time; but any such person may, at any time, be taken into custody by any person authorized by the Governor of this State, and such taking into custody shall be a discharge from any recognizance he may have given.

**SEC. 8125. COSTS AND JAIL FEES.** The person making complaint to procure the arrest of any person, as above provided for, shall be answerable for all the costs of the arrest and trial, and for the jail fees of any person committed to jail; and the justice of the peace or other officer applied to may require such deposit of money, or security, for the payment of all costs, charges and fees in such proceeding as he thinks reasonable, and may refuse to issue a warrant, or to commit a person to jail, or do any thing in such matter until compliance with his requirement of a deposit or other security for the payment of the costs and jail fees likely to be incurred.

## XXI. MISSOURI.

[From the Revised Statutes of Missouri, 1879, chap. 108, §§ 5701-5719, vol. 2, pages 1120-1122.]

SECTION 5701. GOVERNOR TO ISSUE WARRANT, WHEN. Whenever the executive of any other State shall demand of the executive of this State any person as a fugitive from justice, and shall have complied with the requisites of the act of Congress in that case made and provided, it shall be the duty of the executive of this State to issue his warrant, under the seal of the State, directed to any sheriff, coroner or other person whom he may think fit to intrust with the execution of such warrant. [G. S. 869, § 1.]

SEC. 5702. WARRANT TO GIVE WHAT AUTHORITY. The warrant shall authorize the officer or person to whom it is directed, to arrest the fugitive anywhere within the limits of this State, and convey him to any place therein named, and shall command all sheriffs, coroners, constables and other officers to whom the warrant may be shown, to aid and assist in the execution thereof. [G. S. 869, § 2.]

SEC. 5703. WHERE AND HOW EXECUTED. Every warrant so issued may be executed in any part of the State, and the officer or person to whom it is directed shall have the same power to command assistance therein, and in receiving and conveying to the proper place any person duly arrested by virtue thereof, as sheriffs and other officers, by law, have in the execution of civil or criminal processes directed to them, with like penalties on those who refuse their assistance. [G. S. 869, § 3.]

SEC. 5704. POWER AND DUTY OF OFFICER ARRESTING. The officer or person executing such warrant may, when necessary, confine the prisoner arrested by him in the jail of any county through which he may pass, in conveying such prisoner to the place commanded in the warrant; and the keeper of such jail shall receive and safely keep such prisoner until the person having him in charge shall be ready to proceed on his route. [G. S. 869, § 4.]

SEC. 5705. EXPENSES, HOW PAID. The expenses which may accrue under the foregoing sections of this chapter shall be paid by the State or Territory making the demand of such fugitive from justice. [Laws 1877, p. 206, § 1.]

SEC. 5706. JUDGE OR JUSTICE MAY ISSUE WARRANT, WHEN. Whenever any person within this State shall be charged, on the oath or affirmation of any credible witness, before any judge or justice of a court of record, or a justice of the peace, with the commission of any crime in any other State or Territory of the United States, and that he fled from justice, it shall be lawful for the judge or justice to issue his warrant for the apprehension of the party charged. [G. S. 869, § 6.]

SEC. 5707. ON EXAMINATION, PARTY MAY BE COMMITTED. If, upon examination, it shall appear to the judge or justice that the person charged is guilty of the crime alleged, he shall commit him to the jail of the county; or if the offense is bailable, take bail for his appearance at the

next term of the court of the county having criminal jurisdiction. [G. S. 870, § 7.]

**SEC. 5708. PROCEEDINGS ON EXAMINATION.** The judge or justice shall proceed in the examination in the same manner as is required when a person is brought before such officer, charged with an offense against the laws of this State, and shall reduce the examination to writing and make return thereof as in other cases, and shall, also, send a copy of the examination and proceedings to the Governor of this State without delay. [G. S. 870, § 8.]

**SEC. 5709. DUTY OF THE GOVERNOR.** If, in the opinion of the Governor, the examination contains sufficient evidence to warrant the finding of an indictment, he shall forthwith notify the executive of the State or Territory in which the crime is alleged to have been committed, of the proceedings against the person arrested, and that he will be delivered on demand, without requiring a copy of an indictment to accompany the demand. [G. S. 870, § 9.]

**SEC. 5710. OFFENDER TO BE DELIVERED UPON DEMAND.** Where a demand shall be made for the offender, the Governor shall forthwith issue his warrant, under the seal of the State, to the sheriff of the county wherein the party charged is committed or bailed, commanding him to surrender the accused to such messenger as shall be therein named, to be conveyed out of the State. [G. S. 870, § 10a.]

**SEC. 5711. IF AT LARGE ON BAIL, SHERIFF AUTHORIZED TO TAKE HIM.** If the accused shall be at large, on bail or otherwise, it shall be lawful for the sheriff to arrest him forthwith, anywhere within the State, and to surrender him agreeably to the command of the warrant. [G. S. 870, § 11.]

**SEC. 5712. CIRCUIT COURT MAY DISCHARGE.** In all cases where the party shall have been admitted to bail and shall appear, according to the condition of his recognizance, and he shall not have been demanded, the court may discharge the recognizance or continue it, according to the circumstances of the case—such as distance of the place where the offense is alleged to have been committed, the time since the arrest, the nature of the evidence, and the like. [G. S. 870, § 12.]

**SEC. 5713. LIMITATION OF IMPRISONMENT.** In no case shall the party be kept in prison or held to bail beyond the end of the second term of the court after the arrest, and if no demand is made for him within that time, he shall be discharged. [G. S. 870, § 13.]

**SEC. 5714. RECOGNIZANCE TO INURE TO STATE.** When any such recognizance shall be forfeited, it shall inure to the benefit of the State. [G. S. 870, § 14.]

**SEC. 5715. SECURITY FOR COSTS.** When a complaint shall be made against any person, as provided by this chapter, the judge or justice shall take from the prosecutor a bond to the clerk of the court, with sufficient security to secure the payment of the costs and expenses which may accrue

by occasion of the arrest and detention of the party charged, which bond shall be certified and returned, with the examination, to the office of the clerk of the court having criminal jurisdiction. [G. S. 870, § 15.]

SEC. 5716. COSTS, HOW COLLECTED. Upon the determination of the proceedings in that court the clerk may issue fee bills, which shall be served on the principal and securities in the bond by the sheriff in the same manner as other fee bills, for which service the sheriff shall be allowed the same fees as for serving notices. [G. S. 870, § 16.]

SEC. 5717. IF NOT PAID, EXECUTION TO ISSUE, WHEN. If the costs and charges are not paid on or before the first day of the next term of the court, nor any cause shown why they should not be paid, the clerk may issue execution for the same against the parties on whom the fee bills were served. [G. S. 870, § 17.]

SEC. 5718. PRECEDING SECTIONS CONSTRUED. Nothing in the two preceding sections shall be construed to prevent the clerk from instituting suit on such bond for the recovery of the costs and charges. [G. S. 871, § 18.]

SEC. 5719. BAIL MAY BE TAKEN. Whenever any person shall have been committed to the jail of the county upon examination for a bailable offense, under the provisions of this chapter, he may be let to bail with sufficient security for his appearance at the next term of the court of the county having criminal jurisdiction, by the court or judge of the court having criminal jurisdiction, or by any judge or justice of the county court. [G. S. 871, § 19.]

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## XXII. NEBRASKA.

[From the Compiled Statutes of Nebraska, Brown, 1881, chap. 30, §§ 330-334, pages 716, 717.]

SECTION 330. ARREST OF FUGITIVES BY MAGISTRATES. When an affidavit shall be filed before any judge of a district court, or any judge of probate or police court, or any justice of the peace, within this State, setting forth that any person charged with the commission of any criminal offense against the laws of any other State or any of the Territories of the United States, and which, if the act had been committed in this State, would, by the laws thereof, have been a crime, is at the time of filing such affidavit within the county where the same may be filed, it shall be lawful, and it is hereby made the duty of such judge or justice of the peace to issue his warrant, directed to the sheriff or any constable of the county, commanding him forthwith to arrest and bring before the officer issuing such writ the person so charged.

SEC. 331. EXAMINATION. When the person arrested, as provided in the last preceding section, shall be brought before the officer issuing such warrant, it shall be lawful, and it is hereby made the duty of such officer to hear and examine such charge, and upon proof by him adjudged to be sufficient, to commit such person to the jail of the county in which such

examination shall take place, or cause such person to be delivered to some suitable person, to be removed to the proper place of prosecution.

SEC. 832. NOTICE. Whenever any person is committed to jail by any judge or justice of the peace, by either of the provisions of the preceding section, it shall be the duty of such judge or justice of the peace forthwith to give notice, by letter or otherwise, to the sheriff of the county in which such offense shall have been committed, or to the person injured by such offense, or to the proper authorized agent or officer, and no person so committed shall be delayed longer in jail than necessary to allow a reasonable time to the person so notified, after he shall have received such notice, to apply for and obtain the proper requisition for the person so committed.

SEC. 833. DEMAND BY EXECUTIVE OF ANOTHER STATE. Whenever a demand is made upon the Governor of this State by the executive of any other State or Territory, in any case authorized by the Constitution and laws of the United States for the delivery of any person charged in such State or Territory with any crime, if such person is not held in custody or under bail to answer for any offense against the laws of the United States or of this State, he shall issue his warrant under the seal of the State, authorizing the agent who makes the demand, either forthwith or at such time as may be designated in the warrant, to take and transport such person to the line of this State, at the expense of such agent, and may also by such warrant require all peace officers to afford needful assistance in the execution thereof.

SEC. 834. AGENTS TO FOREIGN GOVERNMENTS. The Governor of this State may, in any case authorized by the Constitution and laws of the United States, appoint agents to demand of the executive authority of any foreign government, any fugitive from justice, charged with treason or felony, and the accounts of the agents appointed must be audited by the auditor, and paid out of the State funds.

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### XXIII. NEVADA.

[From Compiled Laws of Nevada, 1873, §§ 2278-2286, vol. 1, pages 548, 549.]

(§ 2278.) SECTION 653. FUGITIVES TO BE DELIVERED UP. A person charged, in any State or Territory of the United States, with treason, felony or other crime, who shall flee from justice and be found in this State, shall, on demand of the executive authority of the State or Territory from which he fled, be delivered up by the Governor of this Territory, to be removed to the State or Territory having jurisdiction of the crime.

(§ 2279.) SEC. 654. HOW APPREHENDED. A magistrate may issue a warrant for the apprehension of a person so charged, who shall flee from justice and be found in this State.

(§ 2280.) SEC. 655. PROCEEDINGS FOR ARREST AND COMMITMENT. The proceedings for the arrest and commitment of the person charged shall be

in all respects similar to those provided in this act for the arrest and commitment of a person charged with a public offense committed within this State, except that an exemplified copy of an indictment found, or other judicial proceedings had against him in the State or Territory in which he is charged to have committed the offense, may be received as evidence before the magistrate.

(§ 2281.) SEC. 656. **SAME.** If, from the examination, it appear that the person charged has committed treason, felony or other crime charged, the magistrate, by warrant reciting the accusation, shall commit him to the proper custody within his county, for a time to be specified in the warrant, which the magistrate may deem reasonable, to enable the arrest of the fugitive under the warrant of the executive of this State, on the requisition of the executive authority of the State or Territory in which he committed the offense, unless he give bail as provided in the next section, or until he be legally discharged.

(§ 2282.) SEC. 657. **BAIL.** The magistrate may admit the person arrested to bail by recognizance with sufficient securities, and in such sum as he may deem proper, for his appearance before him at a time specified in the recognizance, and for his surrender to be arrested upon the warrant of the Governor of this State.

(§ 2283.) SEC. 658. **DISTRICT ATTORNEY TO BE NOTIFIED.** Immediately upon the arrest of the person charged, the magistrate shall give notice to the district attorney of the district of the name of the person and the cause of the arrest.

(§ 2284.) SEC. 659. **NOTICE TO AUTHORITY OF STATE HAVING JURISDICTION.** The district attorney shall immediately thereafter give notice to the executive authority of the State or Territory, or to the prosecuting attorney, or presiding judge of the Criminal Court of the city or county, within the State or Territory having jurisdiction of the offense, to the end that a demand may be made for the arrest and surrender of the person charged.

(§ 2285.) SEC. 660. **IN CERTAIN EVENT TO BE DISCHARGED.** The person arrested shall be discharged from custody or bail, unless before the expiration of the time designated in the warrant or recognizance, he be arrested under the warrant of the Governor of this State.

(§ 2286.) SEC. 661. **RETURN OF PROCEEDINGS TO COURT.** The magistrate shall make return of his proceedings to the next District Court of the county, which shall thereupon inquire into the cause of the arrest and detention of the person charged, and if he be in custody, or the time of his arrest have not elapsed, the court may discharge him from detention, or may order his recognizance of bail to be canceled, or may continue his detention for a longer time, or may readmit him to bail, to appear and surrender himself within a time to be specified in the recognizance.

## XXIV. NEW HAMPSHIRE.

[From General Laws of New Hampshire, 1878, chap. 264, §§ 1-12, pages 599, 600.]

**SECTION 1. ARREST OF FUGITIVES BY MAGISTRATES.** When any person in this State is charged with an offense committed in another State, and is liable by the laws of the United States to be delivered over upon demand of the executive of such State, any court or justice may, upon complaint on oath setting forth the offense and other matters necessary to bring the case within the law, issue a warrant to bring the person so charged before him or some other justice, to answer such complaint.

**SEC. 2. PROCEEDINGS IF OFFENSE IS CAPITAL.** If upon examination there is reasonable cause to believe that the complaint is true, and that such person may be lawfully demanded of the executive of this State, he shall, if charged with a capital offense, be committed to jail, there to be detained until a day so appointed as to allow a reasonable time to obtain the warrant of such executive.

**SEC. 3. RECOGNIZANCE WHEN THE OFFENSE IS NOT CAPITAL.** If such person is charged with an offense not capital, the court or magistrate may order him to recognize, with sufficient sureties, to appear at a day so appointed, and, if he fails to recognize, may commit him to jail, there to be detained not exceeding thirty days, unless sooner discharged by due course of law.

**SEC. 4. PRISONER DISCHARGED UNLESS DEMANDED, WHEN AND HOW.** If the person so recognized or committed appears before the court or magistrate upon the day ordered, he shall be discharged unless he is demanded by some person authorized by the warrant of the executive to receive him.

**SEC. 5. MAY BE ARRESTED, WHEN.** Any person authorized by warrant of the executive may take such offender into custody at any time, whether recognized, committed, or discharged, and such taking shall be a discharge of the recognizance, if any, and shall not be deemed an escape.

**SEC. 6. COMPLAINANT TO PAY COSTS, WHEN.** The complainant in every such case shall pay all the actual costs and charges, and for the support in jail of any person committed as aforesaid at the rate of two dollars and fifty cents per week, and shall advance the money therefor from time to time, or give to the jailer satisfactory security therefor. If the complainant neglects for twenty-four hours after he is required by the jailer to give such security or advance such money, the jailer may discharge him.

**SEC. 7. GOVERNOR TO EXAMINE INTO CAUSE.** When a demand is made upon the Governor by the executive of any other State, for the delivery over of any person charged in such State with any crime, the Attorney-General or any other prosecuting officer, when required by the Governor, shall ascertain and report to the Governor all material facts known relating to the case, and especially whether he is held in custody or is under recognizance to answer for any offense against the laws of the United States, or

of this State, or by force of any civil process, and also whether such demand is made conformably to law, so that such person ought to be delivered up.

**SEC. 8. WHEN TO DELIVER UP AND HOW.** If the Governor is satisfied that the demand is conformable to law and ought to be complied with, he shall issue his warrant, under the seal of the State, authorizing the agent who shall make such demand, either forthwith or at such time as shall be designated in the warrant, to take and transport such person to the line of the State, at the expense of such agent, and shall also, by such warrant, require the civil officers within this State to afford all needful assistance in the execution thereof.

**SEC. 9. TRANSIT THROUGH THE STATE.** When any offender is apprehended in any neighboring State, and it may be necessary to carry him through this State to the place where the offense was committed, any justice, upon application and proof that lawful process has issued against such offender, shall issue a warrant under his hand and seal, directed to any sheriff or his deputy, or to any person by name who shall be sworn to the faithful performance of his duty, authorizing such conveyance.

**SEC. 10. MODE OF PROCEEDING IN SUCH CASE.** Such person or officer shall cause such offender to be conveyed to the line of this State next to the State where the offense was committed, there to be delivered to some proper officer ready to receive him, and all persons to whom such warrant may be directed are required to obey such order, upon payment or tender of the lawful fees therefor.

**SEC. 11. POWERS OF OFFICERS IN SUCH CASES.** Any sheriff, deputy sheriff, constable, or other officer of justice, of any neighboring State, with his assistants, in the execution of any lawful process issuing from and returnable to any court in such State, may pass himself, and convey such persons or things as he may have in his custody by virtue of such lawful process, through this State, in as full and ample a manner as any officer of this State might do.

**SEC. 12. PENALTY FOR OBSTRUCTING OFFICER.** If any person shall assault or obstruct any such officer or his assistant, passing through this State, in the execution of any such process, he shall be liable to the same punishment as if such person were an officer of this State.

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#### XXV. NEW JERSEY.

[From the Revision of the Statutes of New Jersey, § 107, act of March 27, 1874, at page 287.]

**SECTION 107. EXPENSES OF APPREHENSION OF FUGITIVE.** In any case where a person charged in this State with any crime shall flee from justice and be found in another State, and the Attorney-General or the prosecutor of the pleas for any county where such person is so charged shall recommend to the Governor or person administering the Government of this State, to demand the said fugitive, so that he may be brought into this State for



trial; and the said fugitive shall, on the demand of the executive authority of this State, be delivered up and removed to this State, the expense of such removal, being first ascertained to the satisfaction of the Governor or person administering the Government, shall on warrant from him, be paid by the Treasurer of this State, out of any moneys in the treasury not otherwise appropriated. [Act passed Dec. 21, 1824, as supplemented by Laws 1873, chap. 88.]

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#### XXVI. NEW YORK.

[From the Code of Criminal Procedure, part 6, title 4, chap. 1, §§ 827-835.]

**SECTION 827. REQUISITIONS FROM OTHER STATES.** A person charged in any State or Territory of the United States, with treason, felony or other crime, who shall flee from justice and be found in this State, must on demand of the executive authority of the State or Territory from which he fled, be delivered up by the Governor of this State, to be removed to the State or Territory having jurisdiction of the crime.

**SEC. 828. MAGISTRATE TO ISSUE WARRANT.** A magistrate may issue a warrant for the apprehension of a person so charged, who shall flee from justice and be found within this State.

**SEC. 829. PROCEEDINGS FOR ARREST AND COMMITMENT.** The proceedings for the arrest and commitment of the person charged are in all respects similar to those provided in this code, for the arrest and commitment of a person charged with a public offense committed in this State; except, that an exemplified copy of an indictment found, or other judicial proceeding had against him, in the State or Territory in which he is charged to have committed the offense, may be received as evidence before the magistrate.

**SEC. 830. WHEN AND FOR WHAT TIME TO BE COMMITTED.** If, from the examination, it appear that the person charged has committed the crime alleged, the magistrate, by warrant reciting the accusation, must commit him to the proper custody in his county, for a time specified in the warrant, which the magistrate deems reasonable, to enable the arrest of the fugitive under the warrant of the executive of this State, on the requisition of the executive authority of the State or Territory in which he committed the offense, unless he give bail, as provided in the next section, or until he be legally discharged.

**SEC. 831. ADMISSION TO BAIL.** A judge of the Supreme Court may admit the person arrested to bail, by an undertaking, with sufficient sureties and in such sum as he deems proper, for his appearance before him at a time specified in the undertaking, and for his surrender to be arrested upon the warrant of the Governor of this State.

**SEC. 832. NOTICE TO DISTRICT ATTORNEY.** Immediately upon the arrest of the person charged, the magistrate must give notice to the district attorney of the county, of the name of the person and the cause of his arrest.

**SEC. 833. NOTICE TO EXECUTIVE AUTHORITY OF THE STATE, ETC.** The district attorney must immediately thereafter give notice to the executive authority of the State or Territory, or to the prosecuting attorney or presiding judge of the criminal court of the city or county therein, having jurisdiction of the offense, to the end that a demand may be made for the arrest and surrender of the person charged.

**SEC. 834. DISCHARGE, UNLESS DULY SURRENDERED.** The person arrested must be discharged from custody or bail, unless before the expiration of the time designated in the warrant or undertaking, he be arrested under the warrant of the Governor of this State.

**SEC. 835. RETURN OF THE PROCEEDINGS.** The magistrate must return his proceedings to the next court of sessions of the county, which must thereupon inquire into the cause of the arrest and detention of the person charged; and if he be in custody, or the time for his arrest have not elapsed, it may discharge him from detention, or may order his undertaking of bail to be canceled, or continue his detention for a longer time, or readmit him to bail, to appear and surrender himself within a time specified in the undertaking.

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#### XXVII. NORTH CAROLINA.

[From the Code of North Carolina, vol. 1, chap. 26, § 1181, page 456, and §§ 1165-1170, pages 465-467.]

**SECTION 1181. FELONS FLEEING FROM JUSTICE OUTLAWED.** In all cases where any two justices of the peace, or any judge of the Supreme, Superior or criminal courts, shall, on written affidavit, filed and retained by such justice or judge, receive information that a felony has been committed by any person, and that such person flees from justice, conceals himself and evades arrest, and service of the usual process of the law, the said judge, or the said two justices, being justices of the county wherein such person is supposed to lurk or conceal himself, are hereby empowered and required to issue proclamation against him reciting his name, if known, and thereby requiring him forthwith to surrender himself; and also, when issued by any judge, empowering and requiring the sheriff of the county of said justices to take such power with him as he shall think fit and necessary for going in search and pursuit of, and effectually apprehending such fugitive from justice, which proclamation shall be published at the door of the court-house of any county in which such fugitive is supposed to lurk or conceal himself, and at such other places as the judge or justices shall direct; and if any person against whom proclamation hath been thus issued, continue to stay out, lurk and conceal himself and do not immediately surrender himself, any citizen of the State may capture, arrest and bring him to justice, and in case of flight or resistance by him, after being called on and warned to surrender, may slay him without accusation or impeachment of any crime. [1866, chap. 62; 1868-9, chap. 168, sub-chap. 1, § 8.]

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**SEC. 1165. FUGITIVES FROM JUSTICE, WHO MAY ARREST.** Any justice of the Supreme Court, or any judge of the Superior Court or of any criminal court, or any justice of the peace, or mayor of any city, or chief magistrate of any incorporated town, on satisfactory information laid before him that any fugitive in the State has committed out of the State, and within the United States, any offense which, by law of the State in which the offense was committed, is punishable either capitally or by imprisonment for one year or upwards in any State prison, shall have full power and authority, and is hereby required to issue a warrant for said fugitive and commit him to any jail within the State for the space of six months, unless sooner demanded by the public authorities of the State wherein the offense may have been committed, pursuant to the act of Congress in that case made and provided; if no demand be made within that time the said fugitive shall be liberated, unless sufficient cause be shown to the contrary. [1868-9, chap. 178, sub-chap. 3, § 34.]

**SEC. 1166. MAGISTRATES TO KEEP RECORD OF THE PROCEEDINGS AND TRANSMIT COPY TO THE GOVERNOR.** Every magistrate committing any person under the preceding section shall keep a record of the whole proceedings before him, and immediately transmit a copy thereof to the Governor for such action as he may deem fit therein under the law. [1868-9, chap. 178, sub-chap. 3, § 35.]

**SEC. 1167. DUTY OF THE GOVERNOR.** The Governor shall immediately inform the Governor of the State or Territory in which the crime is alleged to have been committed, or the President of the United States, if it be alleged to have been committed within the District of Columbia, of the proceedings had in such case. [1868-9, chap. 178, sub-chap. 3, § 36.]

**SEC. 1168. SURRENDER OF THE FUGITIVE UPON THE ORDER OF THE GOVERNOR.** Every sheriff or jailer, in whose custody any person so committed shall be, upon the order of the Governor, shall surrender him to the person named in such order. [1868-9, chap. 178, sub-chap. 3, § 37.]

**SEC. 1169. GOVERNOR MAY EMPLOY AGENT OR OFFER REWARD FOR THE APPREHENSION OF FUGITIVES CHARGED WITH FELONY.** The Governor, on information made to him of any person having committed a felony or other infamous crime within the State, and of having fled out of the jurisdiction thereof, or who conceals himself within the State to avoid arrest, or who having been convicted has escaped and cannot otherwise be apprehended, may either employ a special agent with a sufficient escort, to pursue and apprehend such fugitive, or issue his proclamation, and therein offer a reward, not exceeding four hundred dollars, according to the nature of the case, as in his opinion may be sufficient for the purpose, to be paid to him who shall apprehend and deliver the fugitive to such person and at such place as in the proclamation shall be directed; and he may from time to time issue his warrants on the State Treasurer for sufficient sums of money for such purpose. [R. C., chap. 35, § 4; 1800, chap. 561; 1866, chap. 28; 1868-9, chap. 52; 1870-1, chap. 15; 1871-2, chap. 29.]

**SEC. 1170. EXPENSES OF ARRESTING FUGITIVES FROM JUSTICE.** In all cases where the Governor of the State has made a requisition on the Governor of another State for any fugitive from justice and has sent an agent to receive said fugitive, it shall be lawful for the Governor to issue a warrant on the State Treasurer for the amount of money necessary to pay the expenses of said agent and other costs in the arresting of said fugitive from justice, to be paid by the Treasurer of the State. [1870-1, chap. 82.]

#### XXVIII. OHIO.

[From Revised Statutes of Ohio, 1880, Dougherty, Brasse & Okey, part 1, title 3, chapter 1, §§ 95-97, vol. 1, pages 205, 206; and part 4, title 2, chapter 2, §§ 7189, 7156-7158, vol. 2, pages 1688 and 1686.]

**SECTION 95. DUTY OF THE GOVERNOR.** The Governor, in any case authorized by the Constitution of the United States, may, on demand, deliver over to the executive authority of any other State or Territory, any person charged therein with treason, felony or other crime committed therein; and he may, on application, appoint an agent to demand of the executive authority of any other State or Territory any person charged with felony who has fled from the justice of this State; but such demand or application must be accompanied by sworn evidence that the party charged is a fugitive from justice, and that the demand or application is made in good faith, for the punishment of crime, and not for the purpose of collecting a debt or pecuniary mulct, or of removing the alleged fugitive to a foreign jurisdiction with a view there to serve him with civil process; and also, by a duly attested copy of an indictment or an information, or a duly attested copy of a complaint made before a court or magistrate authorized to take the same, such complaint to be accompanied by an affidavit or affidavits to the facts constituting the offense charged, by persons having actual knowledge thereof; the same shall also be accompanied by a statement in writing from the prosecuting attorney of the proper county, who shall briefly set forth all the facts of the case, the reputation of the party or parties asking such requisition, and whether, in his opinion, such requisition is sought from improper motives, or in good faith to enforce the criminal laws of Ohio, and such further evidence in support thereof as the Governor may require. Fugitive convicts shall also be so surrendered and demanded, upon sworn evidence, duly authenticated, satisfactory to the Governor. For issuing such requisition, fees not exceeding five dollars may be charged. [As amended by Laws of 1884, February 21. 67 v. 171, J. R.]

**SEC. 96. GOVERNOR MAY REQUIRE INVESTIGATION.** When such demand or application is made, the Attorney-General, or the prosecuting attorney of any county, shall, if the Governor requires it, forthwith investigate the grounds thereof, and report to the Governor all the material facts which may come to his knowledge, with an abstract of the evidence in the case — and, especially in case of a person demanded, whether he is held in custody

or is under recognizance to answer for any offense against the laws of this State, or by force of any civil process— with an opinion as to the legality and necessity of complying with the demand or application.

**SEC. 97. PROCEEDINGS WHEN FUGITIVE FOUND IN THIS STATE.** If, in case of demand for the surrender of a person charged with an offense committed in another State or Territory, the Governor decides that it is proper to comply with the demand, he shall issue a warrant to the sheriff of the county in which such person so charged may be found, commanding him forthwith to arrest and bring such person before a judge of the Supreme Court or a judge of the Court of Common Pleas of this State, to be examined on the charge; and upon the return of the warrant by the sheriff, with the person so charged in custody, the judge before whom the person so arrested is brought, and to whom the warrant is returned, shall proceed to hear and examine such charge, and, upon proof made in such examination by him adjudged sufficient, shall commit such person to the jail of the county in which such examination is so had, for a reasonable time, to be fixed by the judge in the order of commitment, and thereupon shall cause notice to be given to the executive authority making such demand, or to the duly authorized agent of such executive authority appointed to receive the fugitive; and, on payment of all costs by such agent, such fugitive shall be delivered to him, to be thence removed to the proper place for prosecution; and if such agent does not appear within the time so fixed, and pay the costs as aforesaid, the sheriff shall discharge the person so imprisoned.

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**SEC. 7189. ACCUSED MAY BE ARRESTED IN ANY COUNTY.** If the accused flee from justice, the officer holding the warrant may pursue and arrest him in any county of this State, and convey him before the magistrate or court issuing the warrant, or other magistrate or court of the county having cognizance of the case.

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**SEC. 7156. ARREST OF FUGITIVES FROM OTHER STATE.** When an affidavit is filed before a judge of a court of Common Pleas, or judge of Probate or Police Court, or a justice of the peace, setting forth that a person charged with the commission of an offense against the laws of any other State, or of any of the Territories of the United States, and which, if the act had been committed in this State, would, by the laws thereof, have been a crime, is, at the time of filing such affidavit, within the county where the same is filed, such judge or justice of the peace shall issue his warrant, directed to the sheriff or any constable of the county, commanding him forthwith to arrest and bring before him the person so charged.

**SEC. 7157. MAY BE COMMITTED TO JAIL.** When a person is arrested in pursuance of the preceding section, and brought before the officer who issued the warrant, the officer shall hear and examine such charge, and upon proof by him adjudged to be sufficient, commit such person to the jail of the county in which such examination is had, or cause him to be

delivered to a suitable person to be removed before any such judge or justice of the proper county in which to take such examination, who shall take the same, and proceed as if the warrant had been issued by him.

SEC. 7158. NOTICE TO BE GIVEN BY JUDGE OR MAGISTRATE. When a person is committed to jail by a judge or justice of the peace under the preceding section, such judge or justice of the peace shall forthwith give notice, by letter or otherwise, to the sheriff of the county in which such offense was committed, or to the person injured by such offense; and no person so committed shall be detained longer in jail than is necessary to allow a reasonable time to the person so notified, after they receive such notice, to apply for and obtain the proper requisition for the person so committed.

#### DUTY OF GOVERNOR WHERE FUGITIVE HAS FLED TO FOREIGN COUNTRY.

[Act of April 14, 1884.]

SECTION 1. Be it enacted by the General Assembly of the State of Ohio, that whenever it shall be made to appear to the Governor by sworn evidence, in writing, that any person has committed any crime within the State of Ohio, for which by the provision of any law of the United States, or of any treaty between the United States and any foreign government, such person may be delivered to the United States or its authorities by any such foreign government or its authorities, and that such person is a fugitive from the justice of the State of Ohio and may be found within the territory of any such foreign government, it shall be the duty of the Governor, under the great seal of Ohio, to request the President of the United States, or the Secretary of State of the United States, to take any steps necessary for the extradition of such person from such foreign territory, and his delivery to any agent of the State of Ohio whom the Governor may appoint to receive him, or to the proper officer of the county within which he may be charged with such crime: *Provided*, that before any such request be made by the Governor, he shall be satisfied by sworn evidence, in writing, that such extradition is sought in good faith for the punishment of such crime only, and not for the purpose of collecting a debt or pecuniary mulct, nor of bringing the alleged fugitive within the State of Ohio with the view to serve him with civil process, or with criminal process other than for the crime for the commission of which his extradition may be sought.

SEC. 2. This act shall take effect and be in force from and after its passage.

#### XXIX. OREGON.

[From General Laws of Oregon, 1872, chap. 44, §§ 487-501, pages 408, 404.]

SECTION 487. GOVERNOR TO APPOINT AGENT TO DEMAND FUGITIVE. Whenever a person charged with treason, felony or other crime, in this State, shall flee from justice, the Governor of this State may appoint an

agent to demand such fugitive of the executive authority of any State or Territory of the United States, in which he may be found.

**SEC. 488. GOVERNOR MAY REQUIRE REPORT FROM DISTRICT ATTORNEY.** Before appointing such agent, the Governor may require the district attorney of the county to investigate the matter and report to him the material circumstances, together with his opinion upon the expediency of allowing the application.

**SEC. 489. PAYMENT OF EXPENSES OF AGENT.** The account of the agent, embracing his actual expenses incurred in performing the service, must be paid by the State, after being audited and allowed as other claims against the State.

**SEC. 490. FUGITIVE FROM JUSTICE, WHEN TO BE DELIVERED UP.** A person charged, in any State or Territory of the United States, with treason, felony or other crime, who shall flee from justice and be found in this State, must, on demand of the executive authority of the State or Territory from which he fled, be delivered up by the Governor of this State, to be removed to the State or Territory making the demand.

**SEC. 491. WHEN FUGITIVE IS NOT TO BE DELIVERED, AND WHEN HE MAY BE.** When the person demanded is in custody in this State, either upon a criminal charge, an indictment for a crime, or a judgment upon a conviction thereof, he cannot be delivered up until he is legally discharged from such custody; but if he be in custody upon civil process only, the Governor may deliver him up or not, before the termination of such custody, as he may deem most conducive to the public good.

**SEC. 492. REPORT OF DISTRICT ATTORNEY IN RELATION TO CUSTODY OF FUGITIVE.** Before issuing a warrant for the delivery of a fugitive from justice, the Governor may require the district attorney of the county to ascertain and report to him whether such fugitive is in custody as mentioned in the last section, and if he be so upon civil process only, whether such custody be with the consent or procurement of the fugitive.

**SEC. 493. WHEN AND TO WHOM GOVERNOR TO ISSUE WARRANT FOR ARREST.** When the Governor finds that the demand is conformable to law, and the person demanded should be given up, either then, or at some future time if he be in custody, he must issue his warrant under the seal of the State, and attested by the Secretary of State, directed to the person who makes the demand, and authorizing him, either forthwith or at some future time therein designated, to take and transport the fugitive to the border line of the State.

**SEC. 494. EXECUTIVE WARRANT, WHAT TO REQUIRE.** The executive warrant must also require all peace officers and magistrates, when requested by the person to whom the warrant is directed, to render all needful assistance in the execution thereof, and in so doing, such officers or magistrates may exercise the same power and authority to prevent a rescue, an escape, or to effect a recapture, as if the fugitive was in arrest upon a charge of crime committed in this State.

**SEC. 495. MAGISTRATE MAY ISSUE WARRANT.** A magistrate authorized to issue a warrant of arrest, may issue a warrant for the arrest of a person charged as provided in section 490, who shall flee from justice and be found in this State.

**SEC. 496. PROCEEDINGS FOR ARREST, HOW REGULATED.** The proceedings for the arrest and commitment of the person charged are in all respects similar to those provided in this code for the arrest and commitment of a person charged with a crime committed in this State, except that an exemplified copy of an indictment found, or other judicial proceedings had against him, in the State or Territory in which he is charged to have committed the crime, may be received as evidence before the magistrate.

**SEC. 497. WHEN MAGISTRATE TO COMMIT.** If, from the examination it appear that the person charged has committed the crime alleged, the magistrate must commit him to the proper custody in his county for a time specified in the commitment, which the magistrate deems reasonable, to enable the arrest of the fugitive under the warrant of the executive authority of the State on the requisition of the executive authority of the State or Territory in which he committed the crime, or until he be legally discharged, unless he give bail as provided in the next section.

**SEC. 498. MAGISTRATE MAY ADMIT PERSON ARRESTED TO BAIL.** The magistrate may admit the person arrested to bail by an undertaking, with sufficient sureties and in such an amount as he deems proper, for his appearance before him at a time specified in the undertaking, and for his surrender to be arrested upon the warrant of the Governor of this State.

**SEC. 499. MAGISTRATE TO GIVE NOTICE TO GOVERNOR OF COMMITMENT.** Immediately upon the commitment of the person charged, the magistrate must inform the Governor of this State of the name of the person, the cause of the arrest and his commitment; and the Governor must thereupon give the like notice to the executive authority of the State or Territory having jurisdiction of the crime, to the end that a demand may be made for the arrest and surrender of the person charged.

**SEC. 500. PERSON ARRESTED, TO BE DISCHARGED.** The person arrested must be discharged from custody or bail, unless, before the expiration of the time designated in the warrant or undertaking, he be arrested under the warrant of the Governor of this State.

**SEC. 501. PERSON CAUSING ARREST LIABLE FOR COSTS AND EXPENSES.** The person making the complaint to the magistrate is liable for the costs and expenses of the proceedings, and for the support in the jail of the person so committed; and, unless he advances to the jailer, from week to week during the commitment, a sum sufficient for such support, the jailer may, upon the order of any magistrate of the county, discharge such person from custody.



## XXX. PENNSYLVANIA.

[From Purdon's Annual Digest, 1873-1878, pages 2108-2109. Act of May 24, 1878.]

**SECTION 1. DUTY OF GOVERNOR.** It shall be the duty of the Governor of this Commonwealth, in all cases where, by virtue of a requisition made upon him by the Governor of another State or Territory, any citizen, inhabitant or temporary resident of this Commonwealth is to be arrested as a fugitive from justice (provided that the said requisition be accompanied with a certified copy of the indictment or information, from the authorities of such other State or Territory, charging such person with any crime in such State or Territory), to issue and transmit a warrant for such purpose to the sheriff of the proper county, or other officer authorized by law to execute warrants in which the requisition describes the party or parties to be residing or domiciled; and the sheriff, or the deputy sheriff, or other officer as aforesaid, of the county shall alone be competent to make service of the same.

**SEC. 2. HEARING.** Before the sheriff or his deputy, or other officer as aforesaid, shall deliver the person arrested into the custody of the officer or officers named in the requisition, it shall be the duty of the sheriff, or other officer as aforesaid, to take the prisoner or prisoners before a judge of a court of record, who shall, in open court, if in session, otherwise at chambers, inform the prisoner or prisoners of the cause of his or their arrest, the nature of the process, and instruct him or them that if he or they claim not to be the particular person or persons mentioned in said requisition, indictment or affidavit before a magistrate of said other State or Territory, charging said person with some crime, and warrant of arrest, he or they may have a writ of *habeas corpus* upon filing an affidavit to that effect: *Provided, however,* The investigation and hearing under said writ shall be limited to the question of identification, and shall not enter into the merits or facts of the charge or indictment, or information, accompanying or referred to in the requisition. And if, after due hearing, the prisoner or prisoners shall be found to be the parties indicted or informed against, and mentioned in the requisition or warrant, then the court shall order and direct the sheriff, or other officer as aforesaid, to deliver the prisoner or prisoners into the custody of the officer designated in the requisition as the agent upon the part of such State to receive him or them; otherwise to be discharged from custody by the court.

**SEC. 3. FUGITIVE NOT TO BE REMOVED WITHOUT REQUISITION AND HEARING.** It shall not be lawful for any person or officer to take any person or persons out of this Commonwealth upon the ground that the prisoner or prisoners consent to go, or by reason of his or their willingness to waive the proceedings afore-described; and any person or persons who shall arrest or procure the arrest of any citizen, inhabitant or temporary resident of this Commonwealth, for the purpose of taking or sending him to another State, without a requisition first had and obtained, accompanied by a certified copy

of the indictment or information, and without a warrant issued by or under the direction of the Governor of this Commonwealth, served by the sheriff or his deputy, and without first taking him before a judge of a court of record, as aforesaid, shall be guilty of a misdemeanor, and upon conviction be sentenced to one year imprisonment.

SEC. 4. VIOLATION OF STATUTE DECLARED A MISDEMEANOR. Any violation of this act on the part of the sheriff, or his deputy, or other officer as aforesaid, shall be deemed a misdemeanor in office.

SEC. 5. PRELIMINARY ARREST; WHEN REQUISITION TO BE OBTAINED; DISCHARGE. Nothing in this act shall be construed to prevent the sheriff, or chief of police of any city, or other person, to cause the arrest of any person or persons, upon information of the offense or crime committed in another State, and that a warrant has there been issued for the arrest of the said party or parties, or has there been indicted: *Provided*, The officers of any town, city or county, or authorities of such other State or Territory, shall procure a requisition, and have the same presented to the Governor of this Commonwealth, within fifteen days after the arrest shall have been made; and the prisoner or prisoners, upon being arrested or detained, shall be brought before a court or judge, in the manner and for the purpose provided in the second section of this act: *Provided*, Such person shall not be committed, or held to bail, for a longer period than fifteen days exclusive of the day of arrest; at the expiration of which time, if the sheriff has not received the requisition or warrant from the Governor of this Commonwealth, then the person or persons so arrested and detained shall be discharged from custody.

SEC. 6. PENALTY FOR FALSE INFORMATION. Any person giving false information under this act with intent to injure any person, or deprive him of his liberty, shall be liable to the penalties of the third section of this act.

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#### XXXI. RHODE ISLAND.

[From Public Statutes of Rhode Island, 1882, chap. 294, §§ 1-9, pages 705, 706.]

SECTION 1. WARRANT OF COURT. Whenever any person shall be found within this State charged with an offense committed in any other State or Territory and be liable by the Constitution and laws of the United States to be delivered over upon the demand of any executive of any other State or Territory, any court authorized to issue warrants in criminal cases may, upon complaint under oath, setting forth the crime or offense and such other matters as are necessary to bring the case within the provisions of law, issue his warrant to bring the person so charged before the same or some other court within the State, to answer such complaint as in other cases.

SEC. 2. EXAMINATION AND PROCEEDINGS. If upon the examination of any person so charged, it shall appear that there is reasonable cause to believe the complaint true, and that such person may be lawfully demanded of the executive of this State, he shall, if charged with an offense bailable by such magistrate, when committed within this State, be required to recognize in a reasonable sum with sufficient sureties to appear before such court at some future day, allowing a reasonable time to obtain a warrant from the said executive, and to abide the order of such magistrate on such complaint.

SEC. 3. NOT GIVING RECOGNIZANCE, TO BE COMMITTED. If such person shall not so recognize he shall be committed to jail and be there detained until he give such recognizance or until such day.

SEC. 4. PROCEEDINGS IN CASE RECOGNIZANCE DEFAULTED. If he shall recognize and shall fail to appear according to the conditions of his recognizance, he shall be defaulted, and like proceedings shall be had as in case of other recognizances entered into before a magistrate.

SEC. 5. FUGITIVE, BY WHOM TO BE BAILED. If such person shall be charged with an offense not bailable by such court when committed within this State, he shall be committed to prison and there detained until the day appointed for his appearance before such court, but in such case the said person shall be bailable in the same manner as he would be if such offense had been committed in this State.

SEC. 6. WHEN ENTITLED TO BE DISCHARGED. If the person so recognized or committed shall appear before such court upon the day appointed he shall be discharged, unless he shall be demanded by some person authorized by a warrant of the executive to receive him: *Provided*, That whether such person so charged be recognized, committed or discharged, any person authorized by a warrant from the executive of this State may at all times take him in custody, and the same shall be a discharge of the recognizance, if any, and shall not be deemed an escape.

SEC. 7. RECOGNIZANCE FOR COSTS. No warrant shall be issued in pursuance of the provisions of section one of this chapter, until the complainant shall have given recognizance, with surety, in such sum as the court shall approve and direct, to pay all the costs that may accrue thereon, including the board of the person complained of, if committed to jail, nor shall any such warrant supersede any arrest, either on civil or criminal process theretofore made, nor shall any arrest, either on civil or criminal process theretofore made, supersede any arrest made on any such warrant or on any warrant issued by the executive of this State in such cases.

SEC. 8. OFFICERS OF ADJOINING STATES SECURED IN TRANSIT. Sheriffs, deputy sheriffs, constables and other officers of the adjoining States, with their assistants, in the legal execution of any writ, warrant or other process issuing from and returnable to courts in their respective States, shall have full liberty, power and authority to pass and repass and also to convey such persons or things as they may legally have in their custody by

virtue of any writ or warrant, in or by any of the roads or ways lying in or leading through any of the towns or lands of this State, in as full, free and ample manner as the officers of justice of this State do use and exercise in the discharge of their duty and office.

**SEC. 9. PUNISHMENT FOR OBSTRUCTING THEM.** Every person who shall obstruct any such officer of any of the United States in such execution of his office while he is passing through any of the lands or roads of this State, shall be subject to the same pains and penalties as persons would by law be subject to for obstructing similar officers of justice of this State in the due execution of their office.

### XXXII. SOUTH CAROLINA.

[From General Statutes of South Carolina, 1883, part 1, title 6, chap. 15, § 478, page 169; and part 4, title 2, chap. 111, § 2620, page 735.]

**SECTION 478. REWARD FOR FUGITIVES.** Upon satisfactory information that a high crime has been committed against the peace within this State, and that the person committing the same is unknown, or is a fugitive from justice, the Governor may issue his proclamation, offering a reward for the apprehension and conviction of such person — the amount of such reward to be not less than \$50 nor more than \$500. The payment of such rewards to be made upon warrants of the Comptroller-General on any specific appropriation for such purpose; and in default of any such appropriation, then the rewards shall be paid out of the contingent fund of the Governor.

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**SEC. 2620. (1.) OFFICERS MAY ISSUE WARRANTS FOR ARREST OF FUGITIVES.** Any officer in the State authorized by law to issue warrants for the arrest of persons charged with crime shall, on satisfactory information laid before him under the oath of any credible person, that any fugitive in the State has committed, out of the State, and within any other State, any offense which by the law of the State in which the offense was committed is punishable, either capitally or by imprisonment for one year or upwards, in any State prison, shall have full power and authority, and is hereby required, to issue a warrant for said fugitive, and commit him to any jail within the State for the space of twenty days, unless sooner demanded by the public authorities of the State wherein the offense may have been committed, agreeable to the act of Congress in that case made and provided; if no demand be made within the time, the said fugitive shall be liberated, unless sufficient cause be shown to the contrary: *Provided*, that nothing herein contained shall be construed to deprive any person so arrested of the right to release on bail as in cases of similar character of offenses against the laws of this State.

(2.) Every officer committing any person under this section shall keep a record of the whole proceedings before him, and immediately transmit a

copy thereof to the Governor of this State for such action as he may deem fit therein under the law.

(3.) The Governor of this State shall immediately inform the Governor of the State in which the crime is alleged to have been committed of the proceedings had in such case.

4.) Every sheriff or jailer, in whose custody any person committed under this section shall be, upon the order of the Governor of this State, shall surrender him to the person named in said order for that purpose.

### XXXIII. TENNESSEE.

[From Compiled Laws of Tennessee, 1871, Thompson & Steger, vol. 1, paragraph 185, and vol. 2, paragraphs 5340-5354.]

SECTION 185. GOVERNOR MAY APPOINT AGENT TO DEMAND FUGITIVE. He (the Governor) may appoint an agent to demand of the executive authority of any other State of the Union, any fugitive from justice, or any person charged with treason or any other crime committed in this State.

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SEC. 5340. GOVERNOR MAY APPOINT AGENT TO DEMAND FUGITIVE. The Governor may appoint an agent to demand of the executive authority of any other State or Territory, any fugitive from justice, or other person charged with treason, felony or other crime, in this State. [Act 1847-8, chap. 121.]

SEC. 5341. WHO MAY EMPLOY GUARD. Such agent may, if necessary, employ a sufficient guard or escort to bring such criminal to this State, and contract other expenses absolutely required in performing the duties of the agency. [Ib.]

SEC. 5342. EXPENSES, HOW PAID. The expenses thus necessarily incurred, and reasonable compensation to such agent, guard and escort, shall be paid by the Treasurer upon the warrant of the Governor. [Ib.]

SEC. 5343. GOVERNOR MAY ISSUE WARRANT. Whenever a demand is made upon the Governor of this State by the executive of any other State or Territory, in any case authorized by the Constitution and laws of the United States, for the delivery of any person charged in such State or Territory with any crime, if such person is not held in custody or under bail to answer for any offense against the laws of the United States or of this State, he shall issue a warrant for the apprehension of such person. [Iowa Code, 1851, § 3283.]

SEC. 5344. SUBSTANCE OF WARRANT. The warrant shall be under the seal of the State, and authorize the agent who makes the demand, either forthwith or at such time as may be therein designated, to take and transport such person to the line of this State at the expense of such agent, and may also require all peace officers to afford needful assistance in the execution thereof. [Ib.]

**SEC. 5345. MAGISTRATE MAY ISSUE WARRANT, WHEN.** If any person be found in this State charged with any crime committed in any other State or Territory, and liable by the Constitution and laws of the United States to be delivered over upon the demand of the Governor thereof, any magistrate may, upon complaint on oath, setting forth the offense and such other matters as are necessary to bring the case within the provisions of law, issue a warrant to arrest such person. [Ib., § 3284.]

**SEC. 5346. PROCEEDING THEREON.** If, upon examination, it appear that there is reasonable cause to believe the complaint true, and that such person may be lawfully demanded of the Governor, he shall, if not charged with an offense punished capitally by the laws of the State in which it was committed, be required to give bail by bond or undertaking, with sufficient security, in a reasonable sum, to appear before such magistrate at a future day specified (allowing sufficient time to obtain the warrant from the Governor), and abide the order of such magistrate in the premises. [Ib., § 3285.]

**SEC. 5347. PROCEEDINGS THEREON.** If such person does not give bail, or if he is charged with a capital offense, he shall be committed to prison, and there detained until such day, in like manner as if the offense charged had been committed within this State. [Ib., § 3286.]

**SEC. 5348. PROCEEDINGS THEREON.** If such person appear before the magistrate upon the day specified, he shall be discharged unless he is demanded under warrant of the Governor, or unless the magistrate see good cause to commit him to some other day, or to require him to give bail for his appearance at such day, to await a warrant from the Governor. [Ib., § 3287.]

**SEC. 5349. FAILURE TO APPEAR.** A failure of such person to attend before the magistrate at the time and place mentioned in the bond or undertaking is a forfeiture thereof, and the same should be indorsed "forfeited" by the magistrate, and returned to the next criminal or circuit court, as the case may be, where such proceedings shall be had as in case of bonds or undertakings forfeited in that court.

**SEC. 5350. ARREST UNDER GOVERNOR'S WARRANT.** Whether the person so charged be bound to appear, be committed or discharged, any person authorized by the warrant of the Governor may at any time take him into custody, and such apprehension is a discharge of the bond or undertaking, if there be one. [Iowa Code, 1851, § 3289.]

**SEC. 5351. COSTS AND CHARGES.** The complainant in any such case is answerable for all costs and charges, and for the support in prison of any person so committed, and the magistrate before issuing his warrant shall require him to give security for the payment of all such costs, or may require them to be paid in advance to the officers entitled. [Ib., § 3290.]

**SEC. 5352. JAIL FEES TO BE PAID IN ADVANCE.** And no jailer is bound to receive any person committed under a warrant issued by virtue of the provisions of this chapter, until his jail fees for the time specified in such warrant are paid in advance.

**SEC. 5353. SUCH PERSONS TO BE RECEIVED IN JAILS OF ANY COUNTY.** But the officer or person executing such warrant may, when necessary, by paying the jail fees in advance, or otherwise securing them to the satisfaction of the jailer, confine the prisoner arrested by him in the jail of any county through which he may pass; and the jailer, in such case, shall receive and safely keep the prisoner until the person having charge of him is ready to proceed on his route.

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**XXXIV. TEXAS.**

[From the Code of Criminal Procedure, title 14, chap. 1, articles 1022-1039.]

**SECTION 1022. FUGITIVES FROM JUSTICE DELIVERED UP.** A person charged in any other State or Territory of the United States with treason, felony or other crime, who shall flee from justice and be found in this State, shall, on demand of the executive authority of the State or Territory from which he fled, be delivered up, to be removed to the State or Territory having jurisdiction of the crime.

**SEC. 1023. JUDICIAL AND PEACE OFFICERS SHALL AID IN THE ARREST.** It is declared to be the duty of all judicial and peace officers of the State to give aid in the arrest and detention of a fugitive from any other State or Territory, that he may be held subject to a requisition by the Governor of the State or Territory from which he may have escaped.

**SEC. 1024. MAGISTRATE SHALL ISSUE WARRANT FOR ARREST, WHEN.** Whenever complaint on oath is made to a magistrate that any person within his jurisdiction is a fugitive from justice from another State or Territory, it is his duty to issue a warrant of arrest for the apprehension of the person accused.

**SEC. 1025. COMPLAINT, CONTENTS.** The complaint shall be sufficient if it recite —

1. The name of the person accused.
2. The State or Territory from which he has fled.
3. The offense committed by the accused.
4. That he has fled to this State from the State or Territory where the offense was committed.
5. That the act alleged to have been committed by the accused is a violation of the penal law of the State or Territory from which he fled.

**SEC. 1026. WARRANT OF ARREST FROM MAGISTRATE SHALL DIRECT.** The warrant of a magistrate to arrest a fugitive from justice shall direct a peace officer to apprehend the person accused and bring him before such magistrate.

**SEC. 1027. MAGISTRATE SHALL REQUIRE BAIL OR COMMIT ACCUSED.** When the person accused is brought before the magistrate he shall hear proof, and if satisfied that the defendant is charged in another State or Territory with the offense named in the complaint he shall require of him bail, with good

and sufficient security, in such amount as such magistrate may deem reasonable, to appear before such magistrate at a specified time; and in default of such bail he may commit the defendant to jail to await a requisition from the Governor of the State or Territory from which he fled.

**SEC. 1028. CERTIFIED TRANSCRIPT OF INDICTMENT, EVIDENCE.** A properly certified transcript of an indictment against the accused shall be evidence to show that he is charged with the crime alleged.

**SEC. 1029. PERSON ARRESTED SHALL NOT BE COMMITTED, ETC.** A person arrested under the provisions of this title shall not be committed or held to bail for a longer time than ninety days.

**SEC. 1030. MAGISTRATE SHALL NOTIFY SECRETARY OF STATE.** The magistrate by whose authority a fugitive from justice has been held to bail or committed shall immediately notify the Secretary of State of the fact, stating in such notice the name of such fugitive, the State or Territory from which he is a fugitive, the crime with which he is charged and the date when he was committed or held to bail. Such notice may be forwarded either through the mail or by telegraph.

**SEC. 1031. SHALL ALSO NOTIFY DISTRICT OR COUNTY ATTORNEY.** The magistrate shall also immediately notify the district or county attorney of his county of the facts of the case, who shall forthwith give notice of such facts to the executive authority of the State or Territory from which the accused is charged to have fled.

**SEC. 1032. SECRETARY OF STATE SHALL COMMUNICATE INFORMATION.** The Secretary of State upon receiving information, as provided in article 1030, shall forthwith communicate such information by telegraph when practicable, or, if not practicable, by mail, to the executive authority of the proper State or Territory.

**SEC. 1033. ACCUSED SHALL BE DISCHARGED, WHEN.** If the accused is not arrested under a warrant from the Governor of this State before the expiration of ninety days from the day of his commitment or the date of his bail bond, he shall be discharged.

**SEC. 1034. SHALL NOT BE ARRESTED A SECOND TIME.** A person who shall have been once arrested under the provisions of this title, and discharged under the provisions of the preceding article, or by *habeas corpus*, shall not be again arrested upon a charge of the same offense, except by a warrant from the Governor of this State.

**SEC. 1035. GOVERNOR OF THIS STATE CAN DEMAND FUGITIVE.** Whenever the Governor of this State may think proper to demand a person who has committed an offense in this State, and has fled to another State or Territory, he may commission any suitable person to take such requisition; and the accused person, if brought back to this State, shall be delivered up to the sheriff of the county in which it is alleged he has committed the offense.

**SEC. 1036. REASONABLE PAY TO PERSON COMMISSIONED.** The person commissioned by the Governor to bear a requisition for a fugitive from



justice to another State or Territory shall be paid out of the State treasury a reasonable compensation for his services, to be paid upon the certificate of the Governor, specifying the services rendered and the amount allowed therefor.

**SEC. 1037. GOVERNOR MAY OFFER A REWARD, WHEN.** The Governor may, whenever he deems it proper, offer a reward for the apprehension of any person accused of a felony in this State and who is evading an arrest.

**SEC. 1038. SHALL BE PUBLISHED, HOW.** When the Governor offers a reward he shall cause the same to be published in such manner as, in his judgment, will be most likely to effect the arrest of the accused.

**SEC. 1039. REWARD SHALL BE PAID BY STATE.** The person who may become entitled to such reward shall be paid the same out of the State treasury upon the certificate of the Governor, stating the amount thereof, and that such person is entitled to receive the same, and the facts which so entitle such person to receive it.

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#### XXXV. VIRGINIA.

[From the Code of Virginia, Munford, 1873, title 10, chap. 16, §§ 8-17, pages 200-202.]

**SECTION 8. FUGITIVES FROM FOREIGN NATIONS.** The Governor shall, whenever required by the executive authority of the United States, pursuant to the Constitution and laws thereof, deliver over to justice any person found within the State, who shall be charged with having committed any crime without the jurisdiction of the United States.

**SEC. 9. GOVERNOR MAY DELIVER OVER FUGITIVE.** The Governor, though not so required, may, in his discretion, deliver over to justice any person found within the State, who shall be charged with having committed, without the jurisdiction of the United States, any crime, except treason, which by the laws of this State, if committed therein, is punishable by death or imprisonment in the penitentiary; such delivery shall only be made on the requisition of the duly authorized officers or agents of the Government, within the jurisdiction of which the crime shall be charged to have been committed, and the Governor shall require such evidence of the guilt of the person so charged as would be necessary to justify his apprehension and commitment for trial, had the crime charged been committed within this State. The expense of apprehension and delivery shall be defrayed by those to whom the delivery is made.

#### FUGITIVES FROM OTHER STATES.

**SECTION 10. FUGITIVES TO BE DELIVERED UP.** Any person charged in another State of this Union with treason, felony or other crime, who shall flee from justice and be found in this State, shall, on demand of the executive authority of the State from which he fled, made in the manner pre-

scribed by the Constitution and laws of the United States, be delivered up, according to the said Constitution and laws, to be removed to the State having jurisdiction of the crime.

**SEC. 11. ARREST OF FUGITIVES BY MAGISTRATES.** Whenever any person shall be found within this State charged with treason, felony or other crime, committed in any other State, any justice may, upon complaint on oath, or other satisfactory evidence that such person committed the offense, issue a warrant to bring the person so charged before the same or some other justice within the State; and the officer to whom such warrant may be directed may execute the same in any county or corporation in the State, and bring the party, when arrested, before any justice of the same, or any other county or corporation.

**SEC. 12. RECOGNIZANCE TO BE GIVEN.** If it shall appear to the justice before whom the person charged may be brought that there is reasonable cause to believe that the complaint is true, he shall, if he would have been bailable by a justice, in case the offense had been committed in this State, be required to recognize, with sufficient sureties, in a reasonable sum to appear before the court of the county or corporation at a future day, allowing a reasonable time to obtain the warrant of the executive, and to abide the order of the court; and, if such person shall not so recognize, he shall be committed to prison, and be there detained until such day. The recognizance, if any, shall be returned to the said court without delay; and, if the person so recognizing shall fail to appear according to the condition of his recognizance, he shall be defaulted, and the like proceedings shall be had as in the case of other recognizances entered into before a justice; but if such person would not have been bailable by a justice, in case the offense had been committed in this State, he shall be committed to prison, and there detained until the day so appointed for his appearance before the court.

**SEC. 13. NOTICE OF THE ARREST.** The justice by whom such person may be so recognized or committed shall immediately, by letter, apprise the Governor of the fact, who shall thereupon communicate the same to the executive of the State where the crime is charged to have been committed.

**SEC. 14. DISCHARGE OF THE FUGITIVE.** If the person so recognized or committed shall appear before the court upon the day ordered he shall be discharged, unless he shall be demanded by some person authorized by the warrant of the Governor to receive him, or unless the court shall see cause to commit him, or to require him to recognize anew for his appearance at some other day, and, if when ordered, he shall not so recognize, he shall be committed and detained as before. But whether the person so charged shall be recognized, committed or discharged, any person authorized by the warrant of the Governor may, at all times, take him into custody, and the same shall be a discharge of the recognizance, if any, and shall not be deemed an escape.

SEC. 15. COSTS AND EXPENSES. The complainant in such case shall be answerable for all the actual costs and charges, and for the support, in prison, of any person so committed, to be paid in the same manner as by a creditor for his debtor committed on execution; and if the charge for his support in prison shall not be so paid the jailer may discharge such person in like manner as if he had been committed for debt on an execution.

SEC. 16. POSTPONEMENT OF DELIVERY. No person under prosecution for any offense, alleged to be committed within this State, shall be delivered up to the executive authority of another State, or of the United States, until such prosecution shall have been determined, and the person prosecuted shall have been punished, if condemned, nor shall any person, under recognizance to appear as a witness in any such prosecution, be so delivered up until said prosecution shall be determined. Nor shall any person who was in custody upon any execution, or upon process in any suit, at the time of being apprehended for a crime charged to have been committed without the jurisdiction of this State, be so delivered up without the consent of the plaintiff in such execution or suit, until the amount of such execution shall have been paid, or until such person shall be otherwise discharged from such execution or process.

#### REWARDS FOR PERSONS CHARGED WITH OFFENSES.

SEC. 17. REWARD; NONE TO OFFICER. The Governor may offer a reward for apprehending and securing any persons convicted of an offense, or charged therewith, who shall have escaped from prison, or for apprehending and securing any person charged with an offense, who, there is reason to fear, cannot be arrested in the common course of proceeding. But no such reward shall be paid to any sheriff, sergeant or other officer, who may arrest such person by virtue of any process in his hands to be executed.

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#### XXXVI. WEST VIRGINIA.

[From Revised Statutes of West Virginia, Kelly, 1878, chap. 99, §§ 10-18, vol. 2, pages 648-649.]

SEC. 10. FUGITIVES FROM FOREIGN NATIONS. The Governor, whenever required by the executive authority of the United States pursuant to the Constitution and laws thereof, shall deliver over to justice any person found within this State who shall be charged with having committed any crime without the jurisdiction of the United States.

SEC. 11. DELIVERY WITHOUT REQUISITION. The Governor, though not so required, may, in his discretion, deliver over to justice any person found within this State, who shall be charged with having committed, without the jurisdiction of the United States, any crime, except treason, which by the laws of this State, if committed therein, would be punishable by death or imprisonment in the penitentiary. The Governor shall require such evidence of the guilt of the person so charged as would be necessary to

justify an indictment against him, had the crime charged been committed in this State. The expense of the apprehension and delivery shall be defrayed by those to whom the delivery is made.

**SEC. 12. FUGITIVES FROM OTHER STATES.** Any person charged in another State of this Union with treason, felony or other crime, who shall flee from justice and be found in this State, shall, on demand of the executive authority of the State from which he fled, made in the manner prescribed by the Constitution and laws of the United States, be delivered up according to the said Constitution and laws, to be removed to the State having jurisdiction of the crime.

**SEC. 13. ARREST OF FUGITIVES BY MAGISTRATES.** Whenever any person shall be found within this State, charged with treason, felony, or other crime, committed in any other State, any justice may, upon complaint on oath, or other satisfactory evidence, that such person committed the offense, issue a warrant to bring the person so charged before the same or some other justice within the State, and the officer to whom such warrant may be directed may execute the same in any county in the State, and bring the party, when arrested, before any justice of the same or any other county.

**SEC. 14. RECOGNIZANCE.** If it shall appear to the justice before whom the person charged may be brought, that there is reasonable cause to believe that the complaint is true, he shall, if he would have been bailable by a justice, in case the offense had been committed in this State, be required to recognize, with sufficient sureties, in a reasonable sum, to appear before the circuit court of the county at a future day, allowing a reasonable time to obtain the warrant of the executive, and to abide the order of the court; and if such person shall not so recognize, he shall be committed to prison, and be there detained until such day. The recognizance, if any, shall be returned to the said court without delay, and if the person so recognizing shall fail to appear according to the condition of his recognizance, he shall be defaulted, and the like proceedings shall be had as in the case of other recognizances entered into before a justice; but if such person would not have been bailable by a justice in case the offense had been committed in this State, he shall be committed to prison, and there detained until the day so appointed for his appearance before the court.

**SEC. 15. NOTICE OF THE ARREST.** The justice by whom such person may be so recognized or committed shall immediately, by letter, apprise the Governor of the fact, who shall thereupon communicate the same to the executive of the State where the crime is charged to have been committed.

**SEC. 16. DISCHARGE; RE-ARREST.** If the person so recognized or committed shall appear before the court upon the day ordered, he shall be discharged, unless he shall be demanded by some person authorized by the warrant of the Governor to receive him, or unless the court shall see cause to commit him, or to require him to recognize anew for his appearance at some other day; and if, when ordered, he shall not so

recognize, he shall be committed and detained as before. But whether the person so charged shall be recognized, committed, or discharged, any person authorized by the warrant of the Governor may, at all times, take him into custody, and the same shall be a discharge of the recognizance, if any, and shall not be deemed an escape.

SEC. 17. COSTS. The complainant in such case shall be answerable for all the actual costs and charges, and for the support in prison of any person so committed; and if the charge for his support in prison shall not be paid when demanded, the jailer may discharge such person from prison.

SEC. 18. POSTPONEMENT OF DELIVERY. No person under prosecution for an offense alleged to be committed within this State, shall be delivered up to the executive authority of another State or of the United States, until such prosecution shall have been determined, and the person prosecuted shall have been punished, if condemned, nor shall any person under recognizance to appear as a witness in any such prosecution be so delivered up, until said prosecution shall be determined. Nor shall any person who was in custody upon any execution, or upon process in any suit, at the time of being apprehended for a crime charged to have been committed without the jurisdiction of this State, be so delivered up without the consent of the plaintiff in such execution or suit, until the amount of such execution shall have been paid, or until such person shall be otherwise discharged from such execution or process.

SEC. 19. REWARDS; NONE TO OFFICER. The Governor may offer a reward for apprehending and securing any person convicted of an offense or charged therewith, who shall have escaped from prison, or for apprehending and securing any person charged with an offense, who, there is reason to fear, cannot be arrested in the common course of proceeding. But no such reward shall be paid to any sheriff or other officer who may arrest such person by virtue of any process in his hands to be executed.

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#### XXXVII. WISCONSIN.

[From Revised Statutes of Wisconsin, 1878, chap. 189, § 4654, page 1091, as amended by chap. 173, Laws 1881, and chap. 198, §§ 4843-4854, pages 1128-1125.]

SECTION 4654. FUGITIVE NOT ENTITLED TO PRELIMINARY EXAMINATION. No information shall be filed against any person for any offense, until such person shall have had a preliminary examination, as provided by law, before a justice of the peace or other examining magistrate or officer, unless such person shall waive his right to such examination; provided that information may be filed without such examinations against fugitives from justice within the meaning of the Constitution and laws of the United States and against corporations; but no failure or omission of such preliminary examination shall in any case invalidate any informations in any court, unless the de-

defendant shall take advantage of such failure or omission before pleading to the merits, by a plea in abatement. [As amended by chapter 173, Laws of 1881.]

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**SEC. 4843. GOVERNOR MAY APPOINT AGENT.** The Governor of this State may, in any case authorized by the Constitution and laws of the United States, demand of the executive authority of any other State or Territory, any fugitive from justice, or any person charged with felony or any other crime in this State, and appoint agents to receive the same; and whenever an application shall be made to the Governor, for that purpose, the district attorneys or any other prosecuting officer of the State, when required by the Governor, shall forthwith investigate the grounds of such application, and report to the Governor all material circumstances which may come to his knowledge, with an abstract of the evidence, and his opinion as to the expediency of the demand; but the Governor may in any case appoint such agents without requiring the opinion of or any report from the district attorney; and the accounts of the agents appointed for such purpose shall in all cases be audited by the county board of supervisors of the county from which said fugitive may have fled, and paid from the treasury of such county.

**SEC. 4844. CERTIFICATE OF DISTRICT ATTORNEY.** The district attorney, or other prosecuting officer of the State, shall certify that he approves of the application; that the party whose arrest is sought is a fugitive from justice; that he believes the said fugitive to have taken refuge in the State or Territory of (naming the same), and that the ends of justice require that the said fugitive should be brought back to this State for trial.

**SEC. 4845. FAILURE TO CERTIFY.** Nothing in the preceding section shall be construed as prohibiting the issue of requisitions by the Governor in cases where the district attorney or other officer of this State shall refuse to make the application, or where by reason of sickness, or a vacancy in the office, the application cannot be made by a district attorney or other officer; or in other cases where by proper affidavits ample proofs of the propriety and necessity of a requisition shall be furnished to the Governor, but which for good reasons cannot be placed in the form prescribed in the preceding section.

**SEC. 4846. COPIES OF PAPERS TO BE FILED IN EXECUTIVE OFFICE.** Duplicate originals or certified copies of all papers necessary upon application for a requisition, including the application and all other papers in the case, must be furnished to the Governor; and when a requisition is asked for from more than one State, an additional copy thereof must be furnished for each State, and one set of such papers shall be filed and kept in the executive office, and in all cases, except upon indictment, duplicate original, or certified copies of the affidavits and of the papers made before the magistrate for the arrest and examination of the accused must be furnished, with the certificate of such magistrate, that the person making any such

affidavit is to be believed, and with the certificate of the clerk of the circuit court of the county, that such magistrate is a lawful magistrate of such county (and name the town).

SEC. 4847. **GOVERNOR MAY DEMAND OPINION.** When a demand shall be made upon the Governor of this State by the executive of any other State or Territory, in any case authorized by the Constitution and laws of the United States, for the delivery over of any person charged in such State or Territory with treason, felony, or any other crime, the district attorney or any other prosecuting officer of the State, when required by the Governor, shall forthwith investigate the ground of such demand, and report to the Governor all material facts which may come to his knowledge as to the situation and circumstances of the person so demanded, especially whether he is held in custody, or is under recognizance to answer for any offense against the laws of this State or of the United States, or by force of any civil process, and also whether such demand is made according to law, so that such person ought to be delivered up ; if the Governor is satisfied that such demand is conformable to law and ought to be complied with, he shall issue his warrant, under the seal of the State, authorizing any duly appointed agent of the executive who makes such demand forthwith, or at such time as shall be designated by the warrant to take and transport such person to the line of the State at the expense of such agents, and shall also by warrant require the civil officers within this State to afford all needful assistance in the execution thereof.

SEC. 4848. **ARREST OF FUGITIVES BY MAGISTRATES.** Whenever any person shall be found within this State charged with any offense committed in any other State or Territory, and liable by the Constitution and laws of the United States to be delivered over upon the demand of the executive of such other State or Territory, any court or magistrate authorized to issue warrants in criminal cases may, upon complaint under oath, setting forth the offense, and such other matters as are necessary to bring the case within the provisions of law, issue a warrant to bring the person so charged before the same, or some other court or magistrate within the State, to answer to such complaint as in other cases.

SEC. 4849. **THE PROCEEDINGS IN SUCH CASES.** If, upon examination of the person charged, it shall appear to the court or magistrate that there is reasonable cause to believe that the complaint is true, and that such person may be lawfully demanded of the Governor, he shall, if not charged with a capital crime, be required to recognize with sufficient sureties in a reasonable sum, to appear before such court or magistrate at a future day, allowing a reasonable time to obtain the warrant of the executive, and to abide the order of the court or magistrate, and if such person shall not so recognize, he shall be committed to prison and be there detained until such day, in like manner as if the offense charged had been committed within this State, and if the person so recognizing shall fail to appear according to the

conditons of his recognizance, he shall be defaulted and the like proceedings shall be had as in the case of other recognizances entered into before such court or magistrate, but if such person be charged with a capital crime he shall be committed to prison and there detained until the day so appointed for his appearance before the court or magistrate.

SEC. 4850. ACCUSED TO BE DISCHARGED UNLESS DEMANDED. If the person so recognized or committed shall appear before the court or magistrate upon the day ordered he shall be discharged unless he be demanded by some person authorized by the warrant of the executive to receive him, or unless the court or magistrate shall see cause to commit him, or to require him to recognize anew for his appearance at some other day, and if, when ordered, he shall not so recognize, he shall be committed and detained, as before provided; whether the person so charged shall be recognized, committed or discharged, any person authorized by the warrant of the executive may, at all times, take him into custody, and the same shall be a discharge of the recognizance, if any, and shall not be deemed an escape.

SEC. 4851. COMPLAINANT TO PAY COSTS. The complainant in such case shall be answerable for all the actual costs and charges, and for the support in prison of any person so committed, and shall advance to the jailer one week's board at the time of commitment, and so from week to week as long as such person shall remain in jail, and if he fail to do so, the jailer may forthwith discharge such person from his custody.

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#### MICHIGAN.

SECTION 4852. MICHIGAN PRISONERS MAY BE CARRIED THROUGH WISCONSIN. It shall be lawful for all officers in the State of Michigan, or other persons duly authorized, on lawful warrants from any judicial officer of that State to convey any person who has been convicted of, or may be charged with any crime committed within the State of Michigan, through the State of Wisconsin, from the upper peninsula to the lower peninsula, or from the lower peninsula to the upper peninsula of Michigan, for the purpose of final execution or trial.

SEC. 4853. If any person so convicted of or charged with crime in the State of Michigan, on being so conveyed by such officers, or other person duly authorized under the laws of Michigan to have the custody of such person, shall sue out a writ of *habeas corpus*, it shall be a sufficient answer to said writ by the person having such custody, that he holds such person, by virtue of a lawful warrant, from any judicial officer of the State of Michigan, and he shall annex to such answer a copy of the writ, by which he claims the custody of such person.

SEC. 4854. PENALTY FOR AIDING SUCH PRISONER TO ESCAPE. Any or all persons who shall in any manner aid such person so being conveyed



through the State of Wisconsin by virtue of any such writ or warrant, to escape, or shall resist any officer or person while engaged in carrying any such prisoner through this State, shall be liable to the same penalties as now provided by the laws of this State against persons aiding prisoners to escape, or resisting officers of this State.

## IV.

### THE ENGLISH EXTRADITION ACT OF 1870.

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The most of the extradition cases that occur, whether to or from the United States, arise under the treaty of 1842 with Great Britain, and hence it has been judged expedient to place in this Appendix the following sections of the English Extradition Act of 1870, for the information of those who may have occasion to deal with such cases:

SECTION 3. The following restrictions shall be observed with respect to the surrender of fugitive criminals:

(1.) A fugitive criminal shall not be surrendered, if the offense in respect of which his surrender is demanded is one of a political character, or if he prove to the satisfaction of the police magistrate, or the court before whom he is brought on *habeas corpus*, or to the Secretary of State, that the requisition for his surrender has in fact been made with a view to try or punish him for an offense of a political character.

(2.) A fugitive criminal shall not be surrendered to a foreign State, unless provision is made by the law of that State, or by arrangement, that the fugitive criminal shall not, until he has been restored or had an opportunity of returning to Her Majesty's dominions, be detained or tried in that foreign State for any offense committed prior to his surrender, other than the extradition crime proved by the facts on which the surrender is grounded.

(3.) A fugitive criminal who has been accused of some offense within English jurisdiction, not being the offense for which his surrender is asked, or is undergoing sentence under any conviction in the United Kingdom, shall not be surrendered until after he has been discharged, whether by acquittal or on expiration of his sentence or otherwise.

(4.) A fugitive criminal shall not be surrendered until the expiration of fifteen days from the date of his being committed to prison to await his surrender.

SEC. 7. A requisition for the surrender of a fugitive criminal of any foreign State, who is in or suspected of being in the United Kingdom, shall be made to a Secretary of State, by some person recognized by the Secretary of the State as a diplomatic representative of that foreign State. A

Secretary of State may, by order under his hand and seal, signify to a police magistrate that such requisition has been made, and require him to issue his warrant for the apprehension of the fugitive criminal. If the Secretary of State is of opinion that the offense is one of a political character, he may, if he think fit, refuse to send any such order, and may also at any time order a fugitive criminal accused or convicted of such offense to be discharged from custody.

SEC. 10. In the case of a fugitive criminal accused of an extradition crime, if the foreign warrant authorizing the arrest of such criminal is duly authenticated, and such evidence is produced as (subject to the provisions of this act) would, according to the law of England, justify the commitment for trial of the prisoner, if the crime of which he is accused had been committed in England, the police magistrate shall commit him to prison, but otherwise shall order him to be discharged. (The same rule is applied if the criminal has been convicted of an extradition crime.)

SEC. 14. Depositions or statements on oath, taken in a foreign State, and copies of such original depositions or statements, and foreign certificates of, or judicial documents stating the fact of conviction, may, if duly authenticated, be received in evidence of proceedings under this act.

SEC. 15. Foreign warrants and depositions or statements on oath, and copies thereof, and certificates of, or judicial documents stating the fact of a conviction, shall be deemed duly authenticated for the purposes of this act if authenticated in manner provided for the time being by law, or authenticated as follows : (1) If the warrant purports to be signed by a judge, magistrate, or officer of the foreign State where the same was issued ; (2) If the depositions or statements or the copies thereof purport to be certified under the hand of a judge, magistrate, or officer of the foreign State where the same were taken to be the original depositions or statements, or to be true copies thereof, as the case may require ; and (3) If the certificate of, or judicial documents stating the fact of conviction purports to be certified by a judge, magistrate or officer of the foreign State where the conviction took place ; and if in every case the warrants, depositions, statements, copies, certificates, and judicial documents (as the case may be) are authenticated by the oath of some witness or by being sealed with the official seal of the Minister of Justice, or some other minister of State ; and all courts of justice, justices and magistrates shall take judicial notice of such official seal, and shall admit the documents so authenticated by it to be received in evidence without further proof.

SEC. 17. This act, when applied by Order in Council, shall, unless it is otherwise provided by such order, extend to every British possession in the same manner as if throughout this act the British possession were substituted for the United Kingdom or England as the case may require, but with the following modifications, namely : (1) The requisition for the surrender of a fugitive criminal who is in or suspected of being in a British possession may be made to the Governor of that British possession by any person rec-

ognized by that Governor as a consul-general, consul, or vice-consul, or (if the fugitive criminal has escaped from a colony or dependency of the foreign State on behalf of which the requisition is made) as the Governor of such colony or dependency; (2) No warrant of a Secretary of State shall be required, and all powers vested in or acts authorized or required to be done under this act by the police magistrate and the Secretary of State, or either of them, in relation to the surrender of a fugitive criminal, may be done by the Governor of the British possession alone; (3) Any prison in the British possession may be substituted for a prison in Middlesex; (4) A judge of any court exercising in the British possession the like powers as the Court of Queen's Bench exercises in England, may exercise the power of discharging a criminal when not conveyed within two months out of such British possession.

SEC. 18. If, by any law or ordinance, made before or after the passing of this act by the legislature of any British possession, provision is made for carrying into effect within such possession the surrender of fugitive criminals who are in or suspected of being in such British possession, Her Majesty may, by the Order in Council applying this act in the case of any foreign State, or by any subsequent order, either suspend the operation, within any such British possession, of this act, or of any part thereof, so far as it relates to such foreign State, and so long as such law or ordinance continues in force there and no longer; or direct that such law or ordinance, or any part thereof, shall have effect in such British possession, with or without modifications and alterations, as if it were part of this act.

SEC. 19. Where, in pursuance of any arrangement with a foreign State, any person accused or convicted of any crime which, if committed in England, would be one of the crimes described in the first schedule to this act, is surrendered by that foreign State, such person shall not, until he has been restored or had an opportunity of returning to such foreign State, be triable or tried for any offense committed prior to the surrender in any part of Her Majesty's dominions, other than such of the said crimes as may be proved by the facts on which the surrender is grounded.

SEC. 24. The testimony of any witness may be obtained in relation to any criminal matter pending in any court or tribunal in a foreign State in like manner as it may be obtained in relation to any civil matter under the act of the session of the nineteenth and twentieth years of the reign of Her present Majesty, chapter 113, entitled "An act to provide for taking evidence in Her Majesty's dominions in relation to civil and commercial matters pending before foreign tribunals;" and all the provisions of that act shall be construed as if the term "civil matter" included a criminal matter, and the term "cause" included a proceeding against a criminal, provided that nothing in this section shall apply in the case of any criminal matter of a political character.

SEC. 25. For the purposes of this act, every colony, dependency and constituent part of a foreign State, and every vessel of that State shall (except

where expressly mentioned as distinct in this act) be deemed to be within the jurisdiction of and to be part of such foreign State.

SEC. 27. The acts specified in the third schedule to this act are hereby repealed as to the whole of Her Majesty's dominions; and this act (with the exception of any thing contained in it which is inconsistent with the treaties referred to in the acts so repealed) shall apply (as regards crimes committed either before or after the passing of this act), in the case of the foreign States with which those treaties are made, in the same manner as if an Order in Council referring to such treaties had been made in pursuance of this act, and as if such Order had directed that every law and ordinance which is in force in any British possession with respect to such treaties should have effect as part of this act: *Provided*, that if any proceedings for or in relation to the surrender of a fugitive criminal have been commenced under the said acts previously to the repeal thereof, such proceedings may be completed, and the fugitive surrendered, in the same manner as if this act had not been passed.

To these sections it is thought proper to add two others from the Supplementary Extradition Act of 1878, as follows:

SEC. 4. Be it declared, that the provisions of the principal act relating to depositions and statements on oath taken in a foreign State, and copies of such original depositions and statements, do and shall extend to affirmations taken in a foreign State, and copies of such affirmations.

SEC. 7. For the purposes of the principal act and this act, a diplomatic representative of a foreign State shall be deemed to include any person recognized by the Secretary of State as a consul-general of that State, and a consul or vice-consul shall be deemed to include any person recognised by the Governor of a British possession as a consular officer of a foreign State.

## V.

### GOVERNOR CULLOM'S OPINION.

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Governor Cullom, of Illinois, in 1878 gave the following opinion on the subject of inter-State extradition in the cases of Gaffigan and Merrick:

On the 4th day of December, 1878, a requisition was presented to me, issued by the Governor of Pennsylvania, demanding the surrender of two citizens of Illinois, Michael Gaffigan and Michael Merrick, as fugitives from justice. This requisition was based upon an indictment charging the persons named with having murdered one Michael Durkin in the county of Schuylkill, Pennsylvania, on the 1st day of March, A. D. 1865. The indictment was found at the March session of the Court of Oyer and Terminer of Schuylkill county for the year 1865.

On presentation of the requisition, I issued my warrant, and the men were at once arrested, but they have not been surrendered to the agent of the Governor of Pennsylvania. I have been earnestly urged by counsel for the prisoners to withhold their surrender until cause should be shown for revoking my warrant. Being anxious to give the men all the benefits to which they are lawfully entitled, I have carefully considered the evidence submitted to me, and the arguments of counsel. The facts and reasons on which I am asked to revoke my warrant are very important, and demand the most earnest attention.

The extreme gravity of the offense charged, as well as the questions of legal obligation and State comity presented, require and have received from me the most careful consideration.

It is undoubtedly the duty of the executive of each State to give full effect to that provision of the Federal Constitution which requires the return of the fugitives from justice, and to respect all laws made for the purpose of enforcing that provision. I have no inclination to disregard the obligation thus created, even though no power exists by which my action could be controlled. On the other hand, the seizure of a citizen of this State and his forcible transportation to a distant jurisdiction, beyond all protection from the laws of his own State, is a proceeding so serious that it can only be justified by positive law and the concurrence of all the facts required by law. The Governor of a State has a very solemn duty to perform toward his own people, as well as toward other States. He should see that no vio-

lent proceedings be taken against citizens who rely on him for protection, unless such proceedings be fully warranted by law.

Since the arrest of Gaffigan and Merrick the following facts have been so well established by evidence submitted to me that I cannot doubt their truth:

In January, 1865, after the death of Durkin, Gaffigan and Merrick left the county of Schuylkill, Pennsylvania, where they lived up to that time. They were aged respectively twenty-one and twenty-two years. There is no evidence that they attempted to conceal their destination. They came to the State of Illinois, and in 1867 settled in Springfield, the capital of the State, where they have ever since resided. One of them has for years done business as a merchant on one of the principal streets of the city, and has held the office of County Inspector of Mines by appointment of the Board of Supervisors of Sangamon county. The other has acted as School Director of the town of Woodside in the same county. Both have borne their true names and have shown themselves as publicly as any other citizens. Merrick was a married man when he came to Illinois; Gaffigan has married a citizen of this State since coming here. Both have families of children born in this State, and of very tender age. During the residence of these men here they have been in frequent communication with their friends in Schuylkill county, Pennsylvania, their old home. Some years ago Mrs. Merrick, accompanied by four of her children, visited the old home and spent some weeks there, the residence of herself and husband at Springfield, in this State, being known and spoken of among her acquaintances as is usual when persons visit a former place of abode.

The father of Gaffigan, who resided at St. Clair, Pennsylvania, where the murder is alleged to have been committed, openly left that town in 1870 or 1871 for the avowed purpose of living with his son in Springfield, Illinois. After living a short time in Springfield he died, and the fact of his death was at once telegraphed to one Conroy, who was a constable of St. Clair, and a witness whose name was indorsed on the indictment. The remains of the elder Gaffigan were taken back to St. Clair, Pennsylvania, and interred in the presence of a large number of people.

It is abundantly shown that at various times since Gaffigan and Merrick have resided here a large number of residents of Schuylkill county, Pennsylvania, have come to Springfield, and have renewed their acquaintance with the two men named. Some of these persons have lived here a short time, others for years, and then returned to their old home in Pennsylvania. Some have returned again and again. While being here these persons have repeatedly written back to their friends, stating how Gaffigan and Merrick were prospering. This is very natural and very usual. It is shown that these persons, after being for a time in Springfield and returning to Pennsylvania, spoke repeatedly of knowing Gaffigan and Merrick, while here, and stated that Gaffigan and Merrick had treated their old acquaintances very kindly. Indeed, a very large exchange of visits and correspondence is shown to have taken place between the two localities. I may also add

to the facts already stated that a brother of one of the prisoners, who was also included in the indictment, surrendered himself, was tried and acquitted. The men were poor when they came here, but by industry and frugality they have acquired decent homes and have borne characters entirely irreproachable. They have never concealed who they were, nor their former place of residence.

On the part of those who demand the surrender of the men it is alleged (and the statement is supported by affidavit) that the public prosecutor of the county of Schuylkill, Pennsylvania, in office at the time said indictment was found, and most, if not all of his successors up to a very recent date were ignorant of the whereabouts of the persons. This may be true, and I do not at all doubt it, but I think it clear that notwithstanding this, the whereabouts of the men was a matter of public and general notoriety in the county where the crime is alleged to have been committed, for from seven to twelve years before any action was taken for their arrest. They were in constant and open correspondence with their friends; the wife of one was at the old home for weeks; the father of the other openly left the old home to live with his son, and his body was taken back and publicly buried in the presence of a large number of people.

I feel entirely satisfied that, if the whereabouts of the men was unknown to the public prosecutors, it was because they did not take the slightest trouble to inquire. It is impossible that a fact so notorious to a multitude of people could be kept from a public officer if he had made the slightest effort to discover it. It is true that immediately after the homicide a reward was offered and some effort made for the apprehension of the men; but in speaking of delay I refer to the long period that has elapsed since the year A. D. 1865.

Theobald Ruffing, of Schuylkill county, Pennsylvania, deposes that soon after the homicide of Durkin he learned that Gaffigan and Merrick were in Streator, Illinois, and he notified the county commissioners of Schuylkill county of the fact. Said commissioners offered him \$100 if he would arrest Gaffigan and Merrick, but thinking the reward too small he declined to do so. Deponent was at that time a constable.

It is urged by those who support the requisition of the Governor of Pennsylvania that I have no discretion in the matter, but must surrender the men if the papers presented are regular on their face. And this is to my mind the most important question. Have I the right to consider any extraneous facts — the lapse of time, the passiveness of the public prosecutor of Pennsylvania, the hardships of respectable families in this State, or any other matter beyond the very letter of the record?

The Supreme Court of the United States, in the celebrated case of *Kentucky v. Dennison*, made use of language which would seem to justify the conclusion that the Governor of a State to whom a requisition is presented, demanding the return of an alleged fugitive from justice, has only a ministerial duty to perform, and has no authority to look beyond the record. Howard, 66.



The words used by the court are very strong, and if they are to be taken without qualification, would seem to be conclusive. Yet it is entirely certain that notwithstanding that decision it has been the practice of the Governors of many States to look beyond the papers presented. It is clear that where a prisoner is held to answer a criminal charge, in the State where found, he will not be surrendered upon the demand of the executive authority of another State. This has always been the practice in Illinois, as well as in all other States so far as I know. But since the case of *Kentucky v. Dennison*, the Supreme Court of the United States itself has conclusively shown that the words used by the court, in the case last cited, are not to be taken without qualification. In *Taylor v. Taintor* (16 Wallace, p. 386) a peculiar state of facts was shown. One McGuire was indicted in Connecticut and gave bail. He then went to the State of New York, but was taken from there on a requisition from the Governor of Maine, and was imprisoned in the State. He did not appear to answer the indictment in Connecticut, and forfeited his recognizance. Judgment being given against his bondsmen, they carried the case to the Supreme Court of the United States, where the judgment was affirmed. In discussing the questions presented the court say:

"Had the facts been made known to the executive of New York in time it is to be presumed he would have ordered McGuire to be delivered to them (the bondsmen), and not the authority of Maine."

Again on page 374 the court say: "It is true the constitutional provision and the law of Congress under which the arrest and delivery were made are obligatory on every State, and a part of the law of every State. But the duty enjoined is several and not joint, and every Governor acts independently and for himself. There can be no joint demand or refusal. In the event of refusal, the State making the demand must submit. There is no alternative. In the case of McGuire no impediment appeared to the Governor of New York, and he properly yielded obedience. The Governor of Connecticut, if applied to, might have rightfully postponed compliance. If advised in season he might have intervened and by a requisition have asserted the claim of Connecticut. It would then have been for the Governor of New York to decide between the conflicting demands. Whatever the decision, if the proceedings were regular, it would have been conclusive. There could have been no review and no inquiry going behind it."

It thus appears that the language used in *Kentucky v. Dennison* is not unqualified, that an executive officer to whom a requisition is presented may do something more than inquire into the regularity of the record, and that however regular the record there still may be *impediments* of which the executive of whom the demand is made must be the judge. I refer to this case, and to the practice in this and other States, for the purpose of showing that whether my duties be regarded as purely ministerial or *quasi judicial*, I am not only empowered, but required to consider certain extraneous facts not appearing in the record presented to me.

What facts I may inquire into, and what effect shall be given to such facts when established, may be matters of dispute, but I regard it as settled by the highest authority that I am not absolutely bound by the papers certified to by the executive of Pennsylvania.

With this understanding of my powers and duties, I proceed to consider the facts above noticed, and their effect upon the status of Gaffigan and Merrick.

All acts of Congress and all State statutes relating to the surrender of fugitives from justice as between the States are only intended to give effect to section 2 of article 4 of the Constitution of the United States. That section is as follows :

"A person charged in any State with treason, felony or other crime, who shall flee from justice and be found in another State shall, on demand of the executive authority of the State from which he fled, be delivered up to be removed to the State having jurisdiction of the crime."

Now, it is certainly clear that under this provision two circumstances must concur before any person can be lawfully arrested in one State and forcibly sent to another. He must be charged with treason, felony, or other crime, and he must be a *fugitive from justice*. Neither fact is sufficient without the other. It may be admitted that the certificate of the Governor of a State that a party has been charged with crime, when accompanied by a properly authenticated copy of the indictment or affidavit on which the prosecution is based, is conclusive proof of such fact. Under the Constitution the judicial records of each State are entitled to full faith and credit in all the other States. If the records so certified are regular upon their face, the executive of the State to whom the demand is made has clearly no right to go beyond the record and inquire whether the accused is guilty or innocent. The fact that the accused is charged with crime is thus conclusively established. But the second jurisdictional fact still remains to be established.

The Federal Constitution does not prescribe the mode by which it shall be made to appear that the accused has fled from justice ; nor does it in terms declare who shall determine the question. No judicial tribunal is appointed to consider or pass upon the question. It is customary to allege in the requisition that the party named is a fugitive from justice, and to accompany the statement with an affidavit to that effect. But no law requires this course, nor is the legal force of such an affidavit in any way defined. The Governor issuing the requisition must determine that fact for himself in the first instance. It is not at all certain that a prosecution for perjury could be maintained if such affidavit were false. In the absence of any counter evidence such an affidavit would ordinarily be sufficient no doubt, and would be satisfactory to the Governor on whom the demand was made. But is he concluded by such an affidavit ? He does not know that it is true. Indeed, he may positively know that it is false. Can it be that as to a matter not established by a judicial record, the Governor on whom

the demand is made is bound to accept *prima facie* evidence which he knows to be false, and disregard that which he knows to be true?

After full deliberation I am satisfied that as to the fact of the accused being a fugitive from justice, each Governor must judge for himself. The fact is not determined by any judicial act or record, but is *in pais* purely. Whether a person is charged with crime is another matter provable by records that import absolute verity, and therefore cannot be inquired into. But whether he has fled from the State wherein the charge was made is an open question for the determination of which the law has made no provision in terms.

I, therefore, proceed with regard to this question upon that settled principle, that where the law imposes upon any officer the duty of performing any act upon the happening of any event or the proof made of any fact, and at the same time does not create any tribunal for the determination of the condition precedent, such officer is required to judge for himself.

It is true that the act of Congress of Feb. 12, 1793 and that the statutes of the United States declare that whenever any person shall be demanded as a fugitive from justice, he shall be surrendered. But I cannot for a moment believe that it was the intention either of Congress or the State Legislature to go further than the Federal Constitution, or to require the executive of any State to withdraw protection from his own people without inquiring whether the facts exist by which the authorities of a distant State acquired jurisdiction. Indeed, the settled practice of accompanying every requisition with an affidavit setting forth that the accused is a fugitive shows that a mere executive statement to that effect is not sufficient. If it be sufficient, and such statement be conclusive, then the affidavit means nothing whatever. If the Governor making the demand may bind the Governor upon whom he makes it by certifying his conclusion, then it is entirely unnecessary to forward any evidence. But the affidavit is issued in practice because reason has always shown the necessity for satisfying the executive of the State, upon whom the demand is made, that there is evidence to justify the demand. The Supreme Court of the State of Maine, in 1887, held that the duty to surrender arose only where the executive of the State was "satisfied that such a citizen has fled from the State making the demand and not otherwise." 6 American Jurist, 226.

The Attorney-General of Pennsylvania advised the Governor of that State, that where a person departed from a State wherein he was temporarily sojourning to his ordinary and permanent residence in Pennsylvania, this was not fleeing from justice under the Constitution and acts of Congress. Lewis' Cr. Law, 266.

In *Ex parte Joseph Smith*, Mr. Justice McLean, of the Supreme Court of the United States, directly held that a certificate of the Governor of Missouri, that Smith had fled to Illinois was not sufficient to warrant his surrender. 8 McLean, 121.

He also held that the recitals in the requisition could be compared with

the affidavit on which the requisition issued, and that the former could not be held to establish any fact not embraced in the latter. It was thus judicially determined that whether the accused was or was not a fugitive from justice, was a fact to be established by evidence, and that the certificate of the Governor making the demand was not conclusive on this point.

Mr. Hurd, in his work on Habeas Corpus, says: "There must be an actual fleeing from justice, and of this the Governor of the State of whom the demand is made, as well as the one making it, should be satisfied."

I am fully satisfied that it is my bounden duty to inquire whether Gaffigan and Merrick are fugitives from justice, and surrender or refuse to surrender them as I find the facts to be. For this reason I have fully considered all the evidence submitted, the substance of which I have already stated.

I think it may be fairly held that the act of leaving the State of Pennsylvania shortly after the date of the alleged homicide was some evidence that Gaffigan and Merrick were fugitives from justice. That circumstance did not raise any very strong presumption, however, as there is no evidence that they concealed their destination or ever attempted to do so. It does not appear that they were ever even charged with the crime before leaving, the indictment being found in March after they left, and so far as appears, no proceedings were even commenced before any magistrate with a view to their arrest or detention. But granting that the single fact of their leaving the State soon after the homicide is sufficient evidence that they were fugitives from justice, did that character always adhere to them?

For nearly fourteen years they have been in frequent and open communication with their friends in the place where the crime is alleged to have been committed. During that long period their residence has been so generally known and so entirely unconcealed that the officers of justice could be ignorant of it only because they made no effort to find it out. I am aware that as against the crime of murder there is no limitation, but that is not the question. Does the character of a fugitive from justice once attaching to a man never leave him under any circumstances? Can he not purge that taint by showing himself for many years to all the world without disguise and allowing the ministers of justice all proper means of knowing his whereabouts and prosecuting him if they so desire? Suppose these men had voluntarily visited the place where the crime is alleged to have been committed, and after remaining there for a time had returned to Illinois, would they still be fugitives from justice? I think not. That character would have been thrown off. And if so, may not the same result arise from many years of publicity, free communication with friends, and the entire absence of concealment? Such a course is, in my opinion, equivalent to a voluntary return.

All indictments are presumed to be seriously intended, but it frequently happens that prosecutions are instituted which the officers of justice, familiar with the facts, have very little faith in. When such prosecutions are

suffered to slumber for a number of years in spite of the facts that the accused could easily be found and brought to trial, it is impossible to resist the conclusion that no conviction was ever seriously expected. Of course the Governor of the State when applied to would issue his requisition, however stale the prosecution, but the Governor on whom the demand is made is bound to look into all the facts, and afford reasonable protection to the people.

In my opinion Gaffigan and Merrick are no longer fugitives from justice, if they ever were so. Had they concealed themselves, or had there been any difficulty in ascertaining where they were, upon due inquiry by the officers of justice, my conclusion would have been wholly different. But I believe a man may, by long years of good conduct, and by showing himself to the world without concealment, outlive the character of a fugitive from justice, more particularly where the ministers of justice charged with his apprehension practically abandon the charge against him for nearly half the period of human life.

I do not deny that I have carefully considered not only the good character of Gaffigan and Merrick during the last fourteen years, but also the ties which they have formed in this State; I have a duty to perform toward the citizens of Illinois which no law requires me to overlook. But I have allowed no consideration of private hardship to control my action, believing that my conclusions are warranted by strict law.

Believing, then, that neither positive law nor any considerations founded upon justice require the surrender of the men, I must respectfully refuse to comply with the requisition of the Governor of Pennsylvania. The warrant heretofore issued is revoked and Gaffigan and Merrick ordered to be discharged.

(Signed)

S. M. CULLOM,  
*Governor.*

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*E. J. F. B.*









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